Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term 1978

No. ...77-26

ELIZABETH JANE YOUNG CHIN,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Elizabeth Jane Young Chin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 21, 1977.[1]

Citations to Opinions Below

The opinions of the District Court on the issue of suppression of the search warrant and motion to dismiss on the grounds of double jeopardy are unreported and appear in Appendix B *infra* pp. 8a-15a. The Court of Ap-

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[1] Petitioner will be joined by her husband, the co-defendant below, who also seeks certiorari. Some of the grounds he urges are common to both cases; others are different.

peals affirmed from the bench, reading a lengthy oral opinion. A copy of that opinion has been requested by counsel but to date it has not been received.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 21, 1977. A petition for rehearing was denied by that Court on May 10, 1977. Mr. Justice Marshall extended the time for petitioner to file this petition until July 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1) Whether a prior jury verdict of not guilty on the issue of conspiracy to violate Section 922 (a)(3) of Title 28 [Omnibus Crime Control and Safe Streets Act of 1968] did not bar on double jeopardy grounds a second trial on a new indictment involving the same evidence?

In this connection was not the government estopped by considerations of collateral estoppel from retrying the residency issue necessarily decided by petitioner's acquittal of conspiracy to violate the law?

2) Whether the trial court committed error in instructing the jury (over objection) that "residence" means "domicile" as used in a criminal statute (18 U.S.C. § 922) where Congress, with opposite intention, referred to "residence" only in formulating the law.

3) Whether, in view of Congress' express direction that the Omnibus Crime Control and Safe Streets Act of 1968 was not directed against

hunters or their lawful possession of weapons for hunting, it was not error for the court to exclude evidence of petitioner as a hunter, to prevent counsel from arguing this fact in summation and to advise the jury to disregard this fact in its deliberations.

4) Whether affidavits alleging no crime, containing false allegations concerning events remote in time and place were insufficient under the Fourth Amendment to establish probable cause for a search warrant?

Statute Involved

The statutory provisions involved are 28 U.S.C. § 922 (a)(3) and Section 101, Public Law 90-618 and Section 901, Public Law 90-315. These sections appear in Appendix A *infra* pp. 1a-4a.

Statement

Petitioner and the co-defendant, both ardent hunters, possessed several guns in their home used for hunting. Her conviction on a joint charge, along with him, of illegally transporting one of the weapons from California to New York (where she was alleged to reside) was based on a new indictment brought after a jury had acquitted her on a charge of conspiracy with the co-defendant to transport weapons into the State of New York. This new indictment and trial clearly violated the Double Jeopardy Clause of the Constitution.

The conviction under the second new indictment was obtained only after the trial court had misled the jury as to the meaning of "residence" as used by Congress in the Omnibus Crime Control and Safe Streets Act of

1968. The court told the jury that "residence" meant "domicile", contrary to the expressed language of the statute and the intent of Congress. The court further disregarded the intent of Congress which was to protect hunters, as opposed to the "criminal element" in the transportation of weapons across state lines in its rulings.

Petitioner and co-defendant Kenneth Raymond Chin (her husband) were originally indicted jointly in a two-count indictment. It charged:

> 1) Conspiracy to obtain and transport four separately described rifles from California to Brooklyn, New York where they resided. The overt acts alleged in support of the conspiracy were the purchase by petitioner of one of the four rifles in California on July 29, 1975 and possession of all four of the weapons by defendants in their apartment in Brooklyn on October 4, 1975.
>
> 2) Between August 15, 1975 and October 7, 1975, the two defendants illegally transported from California to New York the same four weapons described in the first count, contrary to the same section of law as Count One [28 U.S.C. § 922(a)(3)].

Prior to trial both defendants moved to suppress the four weapons on the grounds that they had been seized in defendants' apartment on the authority of a search warrant issued without probable cause. None of the allegations in two affidavits (one sealed) supporting the search warrant were sufficient.

On motion of petitioner, and with the consent of the government, petitioner's case was severed from that of the co-defendant and petitioner went to trial on the two count indictment. The government produced evidence by

way of records that petitioner and the co-defendant Chin, then unmarried, had lived at an apartment at 825 Union Street from sometime in 1974 through October 4, 1975. Testimony was introduced that Ms. Young had purchased a rifle in California showing a valid California driver's license on July 29, 1975.

Petitioner countered the evidence on residency with testimony (unrebutted) that she had had a quarrel with co-defendant Chin and had left him in early summer of 1975 to return to her parents home in California on a one way ticket, and to take up residence in California where she looked for work and applied for unemployment insurance. Later in August, she changed her mind and returned to New York. These facts were established by the testimony of her father and another witness. Other witnesses testified that petitioner and her later-to-become husband were ardent hunters and used their rifles for hunting.

After deliberation, the jury acquitted petitioner of the first count (conspiracy with co-defendant Chin to transport any of the three weapons from out of the state into the state where she was a resident).[2] The jury could not agree on the substantive count and a mistrial was declared.

The government declined to retry petitioner on the count on which the jury disagreed, but instead obtained a new superseding indictment jointly charging both petitioner and co-defendant Chin with illegally obtaining,

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[2] The trial court judge had stricken all the evidence as to one of the four weapons and did not submit the issue as to that weapon to the jury.

transporting and receiving of the same four weapons.[3] A motion to the trial court to dismiss the indictment against petitioner on grounds of double jeopardy and collateral estoppel was denied.

At the second trial, just as at the first, the government produced evidence that three of the four rifles described in the indictment were found in defendants' Brooklyn apartment on October 4, 1975, pursuant to the execution of a search warrant. A fourth weapon was found in a gun shop in upper New York State. The government then produced testimony of a sporting goods store salesman in Inglewood, California, again as at the first trial, that on July 29, 1975 he had sold a rifle to Elizabeth Jane Young, that he had filled out a form required by law and that she had identified herself by way of a valid California driver's license. A similar form for a sale to a Marc Choyoi Kondo on August 12, 1975 by the same sporting goods store was produced to show that a second rifle found in the defendants' Brooklyn apartment had been sold to Kondo in California.[4]

Again, just as in the first trial various postal employees testified to change of mailing address forms having been filed for each of the defendants from Los Angeles to New York in 1974, and finally to 925 Union Street in Brooklyn on August 30, 1974, and that there were no change of mailing address cards from the Brook-

[3] Despite the court's prior striking of the evidence concerning the fourth weapon at the end of the entire case at the petitioner's first trial, the new indictment included that weapon and evidence was introduced at the new trial concerning that weapon. Petitioner was convicted by the second jury on this count.

[4] This testimony was objected to by petitioner on the ground that all the evidence concerning this weapon had been stricken at the conclusion of the first trial of Ms. Young. The objection was overruled.

lyn street address of the defendants from January 1, 1975 to the date of trial.

An owner of a gun shop in upper New York State "in the heart of hunting country", testified as he had at the first trial that he had first met the defendants on August 30, 1975 in his gun shop in Washingtonville, New York; that he had conversed with them on the subject of guns and hunting, and that they had, a week later, left a rifle with him for repair. The shop owner testified that petitioner had told him that she was looking for an all around shotgun for hunting small game.[5]

Again just as at the first trial the landlord of 925 Union Street testified that rent had been paid every month from August, 1974 to the time of trial on the premises at 925 Union Street, Brooklyn rented to Kenneth R. Chin and Elizabeth Jane Young. Similarly, a Gas Company representative, a Con Ed service representative, and a Telephone Company representative testified that Con Ed, gas and telephone bills were paid regularly throughout the same period—and that the record name on the bills was Elizabeth Young.

The petitioner produced witnesses to show that while Kenneth Chin remained in New York throughout July and August, 1975, she went back to California where she had formerly lived and where her parents lived. Charles Young, the defendant's father, had originally testified at the first trial that his daughter had returned to California on a one-way ticket because "she's" breaking up with Kenny and she wants to work in California"—and further that she had signed up for unemployment insur-

[5] Although the court permitted this testimony brought out on cross-examination about hunting, it cautioned counsel repeatedly that whether or not the defendants were hunters was completely irrelevant to the case.

ance in California. When Mr. Young appeared at the second trial, the court did not permit him to again testify to these facts, urged by petitioner to show her state of mind when she left New York.

The Charge

The court cited the purpose of Congress in passing the Federal Gun Control Act of 1968, but specifically left out any mention of Congress' expressed desire not to "place any unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity". (See 101 Pub.L. 90-618), Appendix A p. 4a.

Despite objection, the court instructed the jury that "residence" as used in the statute is defined in legal terms as "domicile".

The court further instructed the jury over objection that it could infer from the fact of the possession of the weapons by the defendants in October, 1975 "that the accused [meaning both defendants] participated in the unlawful transportation of the weapons". This in effect was a directed verdict of "guilty".

Reasons for Granting the Writ

I.

Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was violated when, after a jury acquittal on conspiracy to violate 18 U.S.C. §922(a)(3) and a mistrial on a substantive count, she was reindicted and retried on the same evidence.

This Court has recently reconsidered its interpretation of the Double Jeopardy Clause in *Jeffers* v. *United States*, — U.S. — decided June 16, 1977, 45 LW 4691 and *Brown* v. *Ohio*, — U.S. — decided June 16, 1977, 45 LW 4697. In *Brown* this Court held that "the Double Jeopardy Clause prohibits a State or the Federal Government for trying a defendant for a greater offense after it has convicted him of a lesser offense." (45 LW 4695). The same rule would follow if the defendant has been acquitted of the lesser offense.

It was the theory of the government's case in the instant case in both trials of petitioner (and under both indictments) that she and the co-defendant Chin agreed that she should go to California to purchase or obtain weapons and bring them back to New York where they continuously resided together. The government's proof of this violation of the statute was allegedly evidence 1) of transportation of the weapons and 2) continuous residence by both defendants in New York throughout July and August 1975 coupled with 3) acquisition of the weapons in California and the presence of the weapons in New York in October 1975.

There was undisputed evidence of the purchase of one of the four weapons by petitioner in California in July, 1975, of the continuing residence of the co-defend-

ant in New York throughout the period, and the presence of three of the weapons in New York in the petitioner and co-defendant's jointly occupied Brooklyn apartment in October 1975. Petitioner disputed, however, any continuing relationship with the co-defendant in July, 1975, and so any illegal agreement with him to obtain any weapons in California. She further disputed any continuous residence in New York, but instead asserted that she quarreled with the co-defendant and changed her residence from New York to California where she was a legal resident when she purchased the one weapon on which her conviction was finally based. The first jury agreed with her contention to the extent of acquitting her on the conspiracy charge and finding true her contention that there was no agreement, and also finding for her, at least partially, in her change of residence claim.

Petitioner asserts here on analogy from *Brown* that her acquittal on the conspiracy charge had the effect of an acquittal on a lesser included offense within the substantive crime and that the government was thereafter barred from reindicting her and retrying her anew on an accusation which required a jury to find joint action and agreement between petitioner and the co-defendant. This Court ruled, consistent with petitioner's contention in *Sealfon* v. *United States*, 332 U.S. 575, 579, 580 (1948):

> "The basic facts of each trial were identical . . . Thus, the core of the prosecutor's case was in each case the same . . . There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

Petitioner also asserts that the charges of conspiracy and violation of the substantive weapons count merge and accordingly the second prosecution was improper under Wharton's Rule. See *Ianelli* v. *United States*, 420 U.S. 770 (1975).

As an additional ground for certiorari petitioner asserts that it was prejudicial error, also under the Double Jeopardy Clause, for petitioner to be retried and have evidence submitted to the jury on a weapon count that had been withdrawn from the first trial jury's consideration and declared by the court to be based on insufficient evidence. The second jury convicted her on this count (Count II) but the court set that conviction aside at the time of sentence. The resubmission to a second jury of this issue, along with the other issues, deprived petitioner, in addition, of her right to a fair trial under the Sixth Amendment.

Finally, with regard to her Double Jeopardy claim, petitioner asserts the bar of collateral estoppel on the narrow issue of the evidence adduced on the subject of her residence in California and her over-all non-criminal intent. "That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal" (*Brown* 45 LW 4699). See *Ashe* v. *Swenson*, 397 U.S. 436 (1970). At the first trial her father was permitted to testify on the issue of her residence, and where she intended to live, by recounting a conversation in which she told him of her quarrel with the co-defendant and her intention to move back to California to live. Although the first jury found favorably to her on this issue by acquitting her of any illegal agreement with the co-defendant, the second jury was not so advised and in fact the father was barred from giving the same favorable (to his daughter) testimony at that second trial.

II.

The Court below misread the statute and violated the intent of Congress in instructing the jury that residence as used in the Omnibus Crime Control and Safe Streets Act of 1968 is defined as "domicile" where Congress used the term residence only.

The pertinent sections of the statute involved read:

"§ 922

(a) It shall be unlawful

. . . . . .

(3) for any person [other than a licensed importer, etc.] to transport into or receive in the State where he resides any firearm purchased outside the State. . . ."

In 1968, Congress declared as its purpose in passing the law that

> "The Congress hereby declares that the purpose of this title . . . is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes. . . ." Appendix p. 4a.

In order to further implement the Act, the Department of the Treasury (Bureau of Alcohol, Tobacco and

Firearms) presumably having in mind congressional intent, issued its official interpretation of the meaning of the law for the reading and understanding of the citizens affected by it in "Gun Control Act, Questions and Answers" [Pub. No. ATF P 7580.1].

Relevant sections interpreting the Act read as follows:

> "(25) May a non-licensee transport firearms interstate for sporting purposes?
>
> "Generally yes. However, the Gun Control Act makes it unlawful for certain persons, such as felons, to engage in the interstate transportation of any firearms or ammunition.
>
> "(26) Is there a Federal Permit which allows an individual to take his personal firearms into another state or carry them locally?
>
> "No. Any requirement in this area is the responsibility of State and local authorities. (Pub. 712).
>
> "(29) What constitutes residency in a State?
>
> "The state of residency is the State in which an individual regularly resides or maintains his home. . . .
>
> "(30) Can a person who resides in one State and own property in another State purchase a firearm in either State?
>
> "If the person maintains a home in both states and resides in both states for certain periods of the year, he may, while residing in each particular state, purchase a firearm in that state. . . .
>
> . . . . .
>
> "(32) Can a person who is relocating out of state move his firearm with other household goods?

> "Yes, he may transport Title I firearms if he is not prohibited by [provisions not relevant here]."

It is clear from a reading of these sections that the law contemplates a person having more than one residence; that a person who has more than one residence may move his rifle or weapon along with other effects between residences and particularly may do so for hunting purposes.

The court in this case in equating "residence" with "domicile" effectively read out of the law what it clearly meant.

The distinction between domicile and residence is often significant in the law. A recent case in the Second Circuit involved this issue. In *Corwin* v. *Interpublic Group of Companies, Inc.*, 512 F.2d 605, 610 (2d Cir. 1975), the court noted that for purposes of a tax statute designed to benefit creditors, the congressional choice of the word "residence" rather than "domicile" should be respected—that the two words do have a different meaning and the difference can be significant.

> ". . . every person has at all times one and only one domicile for the same purpose . . . while a person can have more than one residence."

Also see Reese and Green, "That Elusive Word 'Residence'", 6 Vanderbilt L. R. 561 (1953).

Petitioner's conduct—assuming her transportation of the rifle from California to New York—was in all respects within the law.[6] This is clear from the language

[6] Petitioner bought the rifle referred to in Count I legally in California and could have bought the same rifle legally in New York, c.f. remarks of Senator Kennedy 114 Cong. Rec. 13331.

used by Congress, i.e. "residence", the preamble and statement of purpose of the law—that it was not aimed against hunters and other persons lawfully possessing weapons—and the interpretation given the section by the Department of the Treasury.

The jury, however, was not permitted to construe residency as Congress expressly intended, nor was it given the right to consider Congressional intent concerning hunting, see Point III, *infra*.

Defendant Young brought this to the court's attention by excepting to the charge and by requesting an instruction on the residency issue indicating the relevant portions of the Department of the Treasury handbook.

Assuming, however, *arguendo*, that the statute was ambiguous, the gratuitous and narrow construction of the law given the jury by the trial judge in substituting "domicile" for "residence" was in conflict with the time-honored rule of lenity to be applied in criminal cases. Said Justice Frankfurter for this Court in *Bell* v. *United States*, 349 U.S. 81, 83 (1955):

> "When Congress leaves to the Judiciary the task of imputing to Congress an undecided will, the ambiguity should be resolved in favor of lenity."

Also see *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Feola*, 420 U.S. 671 (dissent Stewart, J., p. 712) (1975). *Scarborough* v. *United States*, — U.S. — decided June 6, 1977, 45 LW 4570 (dissent Stewart, J., p. [illegible]).

III.

The trial court misread the intent of Congress and misled the jury in its interpretation of the law; it was error to instruct the jury that the fact that petitioner was a bona fide hunter was irrelevant to the case.

This Court has recently looked to the intent of Congress in interpreting another section of the Omnibus Crime Control and Safe Streets Act of 1968 in *Scarborough* v. *United States* — U.S. —, decided June 6, 1977, 45 LW 4570, 4572 et seq.

In addition to the express preamble to the Act quoted, *supra*, p. 12, the Congressional record abounds with the legitimate concern of Congress to protect the rights of hunters so that the law not be made burdensome to them. See Senator Long, 114 Cong. Rec. 13868, Senator Randall, 114 Cong. Rec. 16296. On the Senate floor, Senator Brewster queried:

> "Many hunters already own their own rifles or shotguns. Is there anything in this bill that would preclude such a person from taking his rifle or shotgun anywhere in the country, using it for lawful hunting purposes and bringing it back home? No."
>
> "Many hunters and sportsmen who do not already own their rifle or shotgun, like to purchase these weapons out of State, perhaps where they have gone hunting. Is there anything in this bill which would preclude them from buying over the counter a rifle or shotgun anywhere in the country? No." 114 Cong. Rec. 13338.

It was probably thought by the legislators that their extensive concern with legitimate hunters on the one

hand, and the "criminal element" on the other hand, in the drafting of the Omnibus Law would be clear to prosecutors in deciding whom to indict. So would it be clear to courts charged with trying cases and instructing juries that legitimate hunters were not the target of the criminal legislation. The courts below, contrary to the intent of Congress, ignored these considerations.

The government itself adduced evidence that the defendants, and petitioner particularly, were law-abiding citizens in that they paid their bills promptly and made legal application for gun permits, etc. The government produced witnesses who attested to petitioner's being a hunter and making application for a rifle permit which included a declaration of good character.

Nonetheless, the court excluded all mention of both, directed the jury to disregard any evidence on this subject of hunting and threatened to hold defense counsel in contempt for mentioning these relevant facts in her summation.

This was an interference with counsel's legitimate right to sum up. See *Herring* v. *New York*, 422 U.S. 853 (1976).

This blatant disregard of congressional intent requires a hearing by this Court.

IV.

Petitioner's rights under the Fourth Amendment were violated by an illegal search; evidence of the three weapons found in that search should have been suppressed.

The search warrant was issued by a Magistrate and was based on allegations in two affidavits of a Special Agent of the Secret Service. One affidavit was publicly filed, the other sealed, to be revealed to defense counsel only in part, and during proceedings on a motion to suppress.

The assertions in the affidavits were insufficient under the rules established by this Court in *Nathanson* v. *United States*, 290 U.S. 41, 47 (1933); *Aguilar* v. *Texas*, 378 U.S. 108 (1944), and *Spinelli* v. *United States*, 393 U.S. 410 (1969) for the following reasons:

1) Allegations by which the Magistrate could conclude that weapons were present in defendants' apartment in New York concerned the purchase of one weapon by petitioner in California, 66 days before the affidavit; the facts were thus too remote in time and concerned events 3000 miles apart. *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Harris*, 403 U.S. 573 (1971).

2) No facts supporting the commission of a crime were alleged. It was alleged in the affidavit that petitioner purchased a firearm in California on July 29, 1975, with a driver's license, bearing her true name and the address of her California residence, asserting that she had moved from California to New York. It was charged that this conduct involved a violation of 18 U.S.C. § 922(a)(6) [purchasing a firearm with false identification]. The facts alleged were not sufficient to support

this charge (See *United States* v. *Mendoza*, 487 F.2d 309 (5th Cir. 1973) and neither grand jury indicted defendants for this offense. Moreover, there was no allegation that any crime had taken place at the premises to be searched. *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir. 1960); *United States* v. *Harris*, 403 U.S. 573, 579 (1971); *Dumbra* v. *United States*, 268 U.S. 435, 441 (1925).

3) Material misstatements occurred in the second, sealed, affidavit to the effect that the affiant had checked with the post office department and had determined that petitioner and one Joanne Miyamoto lived together at a certain address in Los Angeles three years before. This allegation was supposed to connect petitioner with "subversive" activities which could be a threat to the life of Emperor Hirohito of Japan who was about to visit New York City. The allegation concerning petitioner's living with Joanne Miyamoto was false and a check of postal records, if it had been made as alleged, would have so shown. See *United States* v. *Hunt*, 496 F.2d 888, 894 (5th Cir. 1974); *United States* v. *Thomas*, 489 F.2d 664 (5th Cir. 1973); *United States* v. *Damitz*, 495 F.2d 50 (9th Cir. 1974); *United States* v. *Belculfino*, 508 F.2d 58, 60-63 (1st Cir. 1974); *United States* v. *Prewitt*, 534 F.2d 200 (9th Cir. 1976).

CONCLUSION

This Court should issue a Writ of Certiorari to review the judgment below.

Respectfully submitted,

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Attorney for Petitioner
Elizabeth Jane Young Chin

Dated: July 1, 1977

APPENDIX

APPENDIX A—STATUTES

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful—

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

Section 101 Public Law 90-618

Congressional Findings and Declaration. Section 101 of Pub.L. 90-618 provided that: "The Congress hereby declares that the purpose of this title [which amended this chapter] is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private

ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

Section 901, Public Law 90-315

Section 901 of Pub.L. 90-351 provided that:

"(a) The Congress hereby finds and declares—

"(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

"(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

"(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;

"(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;

"(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;

"(6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;

"(7) that the United States has become the dumping ground of the cast-off surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes), imported into the United States in recent years, has contributed greatly to lawlessness and to the Nation's law enforcement problems;

"(8) that the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, anti-tank guns, and so forth, and destructive de-

vices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern;

"(9) that the existing licensing system under the Federal Firearms Act [former sections 901 to 910 of Title 15] does not provide adequate license fees or proper standards for the granting or denial of licenses, and that this has led to licenses being issued to persons not reasonably entitled thereto, thus distorting the purposes of the licensing system.

"(b) The Congress further hereby declares that the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title [enacting this chapter and repealing sections 901 to 910 of Title 15]."

APPENDIX B—Judgment and Opinions

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-five day of March, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges

HON. CONSTANCE B. MOTLEY
District Judge

76-1420

76-1517

76-1456

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Appellant.

—v.—

KENNETH RAYMOND CHIN, ELIZABETH JANE YOUNG,
n/k/a Elizabeth Jane Young Chin,
Defendants-Appellants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by ARTHUR HELLER
Deputy Clerk

Memorandum Decision and Order Denying Motion to Suppress

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
No. 75-CR-851

UNITED STATES OF AMERICA,

—against—

ELIZABETH JANE YOUNG and KENNETH RAYMOND CHIN,
Defendants.

February 23, 1976

MISHLER, *C.J.*

Defendants are charged with illegally transporting firearms in interstate commerce in violation of 18 U.S.C. § 922(a)(3) and (6), and with conspiracy to commit the offense, 18 U.S.C. § 371. Defendants move, pursuant to F.R. Crim P. 41, to suppress as evidence weapons and other material seized during a search of apartment 4B in premises 925 Union Street, Brooklyn, New York on October 4, 1975, which search was authorized by a search warrant issued by United States Magistrate Vincent A. Catoggio on October 3, 1975. The motion which the government submitted to support its request for the search warrant attacks the sufficiency of the affidavits which the government submitted to support its request for the search warrant.[1]

[1] Two affidavits made by Special Agent Neal Findley of the United States Secret Service, both sworn to October 3, 1975, were submitted to the magistrate. One of the affidavits (described as the supplemental affidavit) was ordered sealed by the magistrate on application of the United States Attorney, on the representation that revelation of the information would place the informant's life in jeopardy. The supplemental affidavit, with paragraph 2 excised, was made available to defendants' counsel at oral argument of this motion. The government represented that the safety of the informant required that the information contained in paragraph 2 be withheld.

Memorandum Decision and Order Denying Motion to Suppress

Defendants argue that (1) the affidavits are insufficient as a matter of law since they fail to state facts indicating that a federal crime was probably committed; (2) the affidavits fail to establish a nexus between the purchase of a gun in California and the likelihood of its presence at the apartment sought to be searched; and (3) the search was not timely made.[2] Defendants also charge that the warrant issued was based on false statements that affected the magistrate's probable cause determination.[3]

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[2] The time lapse from purchase of the gun in California, July 29, 1975, to the day of the search, October 4, 1975, was 67 days.

[3] Findley's affidavit, in which he stated the grounds for his information and belief that one (1) AR-180 semi-automatic rifle, bearing Serial Number S-12585, was concealed at 925 Union Street, Brooklyn, New York, is as follows:

1. An interview by Special Agents of the United States Secret Service of Carl V. Copeland, Jr., a salesman at Coles Sporting Goods Store, Inglewood, California, a licensed firearms dealership, wherein he stated that he sold the above-described firearm, serial number S-12585, for $270 to a person who identified herself as Elizabeth Jane Young on July 29, 1975.

2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California driver's license, N-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Service authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.

3. Further investigation by your deponent and other Special Agents of the United States Secret Service which

[Footnote continued on following page]

Memorandum Decision and Order Denying Motion to Suppress

The disclosed portions of the supplemental affidavit allege that the Federal Bureau of Investigation supplied information to the United States Secret Service that Joanne Miyamoo and Mary Kochiyama were members of the Asian Americans for Action, which organization had demonstrated against the United States-Japanese security treaty, and that Kochiyama was a contact for various extremist groups, including the Black Panther Party and the Black Liberation Army. These portions also allege that Miyamoto and Kochiyama pose a threat to the personal safety of the Emperor of Japan during his visit, which was scheduled to take place between October 4, 1975 and October 7, 1975; the search for the aforementioned semi-automatic rifle is said to be related to the threat thus posed.

Sufficiency of the Affidavit

Findley's affidavit shows that at the time of purchase of the firearm in Inglewood, California, Young had directed that all her mail addressed to 1555 6th Avenue, Los Angeles, California, be forwarded to 3306 92nd Street, Jackson Heights, Queens, New York, and then to 925 Union Street (Apt. 4B), Brooklyn, New York. The fair reading of the affidavit, *United States* v. *Aentresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746 (1965), affords a

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revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

basis for the magistrate's finding that Young, who was not a licensed importer, dealer or collector, transported the firearms to New York in violation of 18 U.S.C. § 922(a)(3). The records of Cole's Sporting Goods Store, and of the United States Postal Service, provided the necessary probable cause. *See United States* v. *Weatherford*, 471 F.2d 47, 49 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S.Ct. 2144 (1973).

The Nexus Between the Purchase of the Gun and its Presence at Apartment 4B, 925 Union Street

The likely place for concealment of a semi-automatic rifle would be the owner's home, *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *United States* v. *Rahn*, 511 F.2d 290, 294 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. 10/6/75). It was not necessary for the government to submit direct evidence that the firearm was on the premises to be searched. The probability that it was there is sufficient, *United States* v. *Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973), *cert. denied*, 417 U.S. 9300, 94 S. Ct. 2640 (1974); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970).

Timeliness of the Search

The attack upon the warrant as being untimely is a claim that at the time of the issuance of the warrant, the magistrate did not have reasonable cause to believe that the gun was in Young's possession at that time—some 66 days after its purchase. Lapse of time is not the sole variable in determining whether the belief as to someone's possession of evidence is reasonable. A week might conceivably be too long a period for the search of perishable goods such as narcotics. The test to be applied must be the reasonable probability of whether Young

would likely have disposed of an automatic rifle, purchased under the circumstances in the case at bar, within the period of time which had passed. The expectation that the firearm was at the premises at the time of the warrant's issuance was not unreasonable. *United States* v. *Steeves, supra* at 37-38.

Misstatement in Supplemental Affidavit

The court finds the affidavit in support of the warrant is sufficient. The alleged misstatements in the supplemental affidavit are therefore inconsequential. *United States* v. *Gonzalez*, 488 F.2d 833, 838 (2d Cir. 1973).

Defendant's motions to suppress the evidence seized during the search at 925 Union Street are in all respects denied, and it is

So Ordered.

/s/ JACOB MISHLER
U.S.D.J.

Memorandum Decision and Order Denying Motion to Dismiss Superseding Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 75-CR-851

UNITED STATES OF AMERICA,

—against—

ELIZABETH JANE YOUNG and KENNETH RAYMOND CHIN,
Defendants.

June 16, 1976

MISHLER, *C.J.*

Defendant Elizabeth Jane Young moves to dismiss the superseding indictment filed April 19, 1976, on the ground that the acquittal after trial of the conspiracy count (Count One, of the prior indictment, collaterally estops the government from prosecuting on the superseding indictment). Alternatively, she moves to dismiss Counts Three and Four of the superseding indictment on the ground that prosecution on those counts would violate her fifth amendment right not ". . . for the same offense to be twice put in jeopardy of life and limb."

On November 11, 1975, the grand jury returned indictment 75 CR 851, charging that on July 29, 1975, and October 4, 1975, defendant conspired with Kenneth Raymond Chin to transport four (4) firearms[1] from Los

[1] The weapons were identified as a United States M- carbine, serial number 5487136; an Armalite AR 7 rifle, serial number 89474; an Armalite 180 rifle, serial number 12590; and an Armalite 180 rifle, serial number 12585.

Angeles, California, to Brooklyn, New York, where Young and Chin allegedly resided, in violation of 18 U.S.C. §§ 371, 922(a)(3). Two overt acts were alleged: (1) the purchase of an Armalite rifle, serial number 12585; and (2) the possession of said four (4) firearms at 925 Union Street, Brooklyn, New York. Defendant and Chin were also charged with transporting the firearms from California to their residence in Brooklyn. Immediately prior to trial, the court granted the government's motion to sever the trials of Young and Chin. The government elected to proceed first against Young. The jury returned a verdict of not guilty on Count One and was unable to agree on a verdict on Count Two. The court there upon declared a mistrial on Count Two.

The superseding eight-count indictment charges Young and Chin with the transportation and receipt of four firearms, *i.e.*, an Armalite AR-180, serial number 12585; an Armalite AR-180, serial number 12590; an Armalite AR-7, serial number 89474; and an M-1 carbine, serial number 5487136.

During the trial of the first indictment, before charging the jury, the court struck the testimony concerning the Armalite 180 rifle, serial number 12590, on the ground that the government had failed to prove that Young had transported the weapon into New York.[2] Defendant contends that this ruling was a determination precluding further prosecution for transporting and receiving the weapon as charged in Counts Three and Four of the superseding indictment. The court's ruling striking the testimony was an evidentiary ruling only, and

[2] The government's proof showed only that Coles Sporting Goods Store in California sold the gun to one Mark Choyei Kondo and that it was found in defendant's home when the said weapon and others were seized pursuant to a search warrant.

did not determine the guilt or innocence of Young with respect to the crimes charged; therefore, the ruling does not bar prosecution for importing and receiving the subject weapon as charged in Counts Three and Four of the superseding indictment.

Defendant further contends that the acquittal on the conspiracy count was a finding against the government on the two issues presented in the superseding indictment as to each firearm, *i.e.*, (1) transportation into the State of New York, and (2) receipt of the weapons by the defendants.[3]

In *Pereira* v. *United States*, 347 U.S. 1, 74 S.Ct. 358 (1954), defendants were convicted of three counts of mail fraud and conspiracy to commit the substantive crimes. The Supreme Court indicated the extent to which double jeopardy protects a defendant from convictions of both conspiracy and the substantive crime upon which the conspiracy is based as follows:

> It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both (citations omitted). Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.

Id. at 11, 74 S.Ct. at 364.

The original indictment narrowly limited the charges to transporting firearms into New York State by a resi-

[3] The transportation charges are the odd numbered counts while the receiving charges are the even numbered counts.

dent of New York State,[4] and conspiring to transport the weapons into New York State (Count One). Defendant understood the specific issues involved in both counts.[5]

Proof of importation into New York State is not essential to prove the conspiracy charge. Proof that defendant was a resident of the State of New York at the time of the importation is an essential element of the substantive offense; for the conspiracy count, the government's burden on proof of residency was only to prove that the conspiracy contemplated that one of the conspirators be a resident of New York at the time of importation.

The not guilty verdict on the conspiracy count does not bar prosecution of the substantive counts charged in the superseding indictment, *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir. 1974); *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961).

The motion to dismiss the indictment is in all respects denied, and it is

So ORDERED.

JACOB MISHLER
U. S. D. J.

[4] Count Two was based on the specific act of violating 18 U.S.C. § 922(a)(3) in that defendant was charged in the language of the section making it unlawful ". . . to transport into . . . the State where [s]he resides . . . any firearm purchased or otherwise obtained by such person outside that State. . . ."

[5] Defendant's counsel argued ". . . this is not a possession case . . . this is a case only concerning the illegal transportation of a firearm (Tr. p. 478)."

Supreme Court, U. S.
FILED
DEC 13 1977
MICHAEL RODAK, JR., CLERK

Nos. 77-26 and 77-32

In the Supreme Court of the United States

OCTOBER TERM, 1977

ELIZABETH JANE YOUNG CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

KENNETH CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-26

ELIZABETH JANE YOUNG CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-32

KENNETH CHIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals wrote no opinion. The opinions of the district court (No. 77-26, Pet. App. 7a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals (No. 77-26, Pet. App. 5a-6a; No. 77-32, Pet. App. 1a-2a) was entered on March 21, 1977. A petition for rehearing with suggestion for rehearing *en banc* (No. 77-32, Pet. App. 3a-5a) was denied on May 10, 1977. Mr. Justice Marshall extended the time for filing the petitions for a writ of certiorari in both cases to and including July 5, 1977, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner Elizabeth Chin's retrial on a substantive count, following the first jury's failure to reach a verdict on that count and its entry of a verdict of acquittal on the charge of conspiracy to commit that offense.

2. Whether the warrant issued to search petitioners' residence was valid.

3. Whether the district court's instructions were proper.

4. Whether the evidence was sufficient to establish Kenneth Chin's participation in the acquisition or transportation of the firearm.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, both petitioners were convicted of unlawful transportation

into New York of a firearm purchased in California, in violation of 18 U.S.C. 2 and 922(a)(3). Petitioner Kenneth Chin was also convicted on a second count of receiving that firearm in New York, in violation of the same statutes. Kenneth Chin was sentenced to concurrent terms of three years' probation on each count. Elizabeth Chin was also placed on three years' probation. The court of appeals affirmed (No. 77-26, Pet. App. 5a-6a; No. 77-32, Pet. App. 1a-2a).

1. The trial was the second involving charges against the petitioners. On November 11, 1975, petitioners were indicted on one count of transporting into New York four firearms obtained by them in California, in violation of 18 U.S.C. 2 and 922(a)(3), and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. The government's motion for a severance was granted, and petitioner Elizabeth Chin was tried on April 12, 1976. The jury returned a verdict of not guilty as to the conspiracy count (1 Tr. 607)[1] but failed to reach an agreement as to the substantive count, and the district court declared a mistrial as to that count (1 Tr. 630).

2. Subsequently, on April 19, 1976, a superseding eight-count indictment was returned against petitioners, charging each with four counts of transporting firearms from California to New York and four counts of receiving those firearms.[2] In brief,

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[1] "1 Tr." refers to the transcript of the first trial; "2 Tr." refers to the transcript of the second trial.

[2] Count one charged both petitioners with transporting an Armalite AR-180 semi-automatic rifle ("the first AR-180");

the evidence at trial showed that on October 4, 1975, agents of the United States Secret Service conducted a search pursuant to a warrant at an apartment leased by petitioners in Brooklyn, New York. They found a small arsenal of firearms and ammunition,[3] including the subject of the first two counts, an Armalite AR-180 semi-automatic rifle which had been sold to petitioner Elizabeth Chin by Cole's Sporting Goods in Inglewood, California on July 29, 1975. Also seized from the apartment or elsewhere were the three other weapons that were the subjects of the six other counts,[4] as well as other weapons with respect to which petitioners were not charged.

At the close of the evidence, the court dismissed the four counts of receipt against Elizabeth Chin. The jury found Elizabeth Chin guilty of transporting both AR-180's (Counts 1 and 3), and acquitted

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count two charged both petitioners with receiving that weapon. Count three charged both petitioners with transporting a second AR-180; count four charged both petitioners with receiving that weapon. Count five charged both petitioners with transporting an Armalite AR-7 semi-automatic rifle; count six charged both petitioners with receiving that weapon. Count seven charged both petitioners with transporting an M-1 carbine; count eight charged both petitioners with receiving that weapon. All transportation counts alleged that the petitioners transported the weapon specified from California to New York; all receiving counts alleged receipt of the weapon in New York.

[3] The agents seized several semi-automatic weapons, pistols, knives, magazines and boxes of ammunition, photographs of which are at pages A-18 to A-20 of the Government's Supplemental Appendix in the court of appeals. A copy of the Supplemental Appendix has been lodged with the Clerk.

[4] See note 2, *supra*.

her of the charges of transporting the AR-7 and the M-1 carbine. Kenneth Chin was found guilty of transporting and receiving the two AR-180's (Counts 1 through 4) and acquitted of transporting and receiving the AR-7 and the M-1. At sentencing, the district court ruled that the indictment was multiplicious and set aside the conviction and dismissed the indictment of Elizabeth Chin for transporting the second AR-180 (Count 3), leaving only the conviction for transporting the first AR-180 (Count 1). The court also set aside the convictions and dismissed the indictment of Kenneth Chin for transporting and receiving the second AR-180 (Counts 3 and 4), leaving only the conviction for transporting and receiving the first AR-180 (Counts 1 and 2) (Sentencing Hrg. 5-10).

ARGUMENT

1. Petitioner Elizabeth Chin contends (Pet. 9-11) that the Double Jeopardy Clause barred her retrial after she was acquitted on the conspiracy count and a mistrial was declared on the substantive count in the original indictment (charging transportation of all four firearms). Essentially, it is her claim that the verdict of acquittal on the conspiracy count necessarily determined in her favor not only that there was no illegal agreement between her and petitioner Kenneth Chin to transport the weapons, but also that she had changed her residence to California[5] at the

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[5] Petitioner's defense in both trials was that she was a resident of California at the time she purchased the weapons. This defense was directed at the fact that 18 U.S.C. 922(a)(3) prohibits transportation or receipt "in the State where

time the weapons were purchased, that both facts were essential to conviction of the substantive offenses charged in the superseding indictment, and therefore that the government was collaterally estopped from relitigating those issues.[6] See *Ashe* v. *Swenson*, 397 U.S. 436, 443, holding that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

Petitioner's claim must fail for two reasons. The first is that, unlike the situation in *Ashe* v. *Swenson*, petitioner's first trial included the charge upon which she was ultimately convicted. The jury at that trial did not acquit her of the charge but, instead, was unable to reach a verdict. Even if petitioner were

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[the defendant] resides" of any firearm obtained "by such person outside that State," subject to exceptions not here relevant. Thus, proof that petitioner resided in a state other than California, where the weapons were purchased, was necessary to convict. The government charged that petitioner Elizabeth Chin was a resident of New York; the court instructed the jury that it must so find in order to convict (2 Tr. 781-782).

[6] She also claims (Pet. 11) that "the charges of conspiracy and violation of the substantive weapons count merge and accordingly the second prosecution was improper under Wharton's Rule." This contention is insubstantial. It has long been recognized that the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U.S. 640, 643; see also *Pereira* v. *United States*, 347 U.S. 1; *Iannelli* v. *United States*, 420 U.S. 770.

correct that the failure to acquit on the substantive charge was inconsistent with the same jury's acquittal on the conspiracy charge, it is the settled rule that consistency in verdicts is not required. *Hamling* v. *United States*, 418 U.S. 87, 101. Accordingly, the failure of the jury to agree upon a verdict on the substantive count at the first trial rendered petitioner subject to retrial on that charge under the traditional "manifest necessity" doctrine (*United States* v. *Perez*, 9 Wheat. 579), irrespective of the jury's disposition of other charges considered at the same trial. See *United States* v. *McGowan*, 385 F. Supp. 956 (D. N.J.). Petitioner cannot successfully maintain that the jury at the first trial "necessarily" acquitted her of the substantive charge when in fact it did no such thing.

Even had petitioner not been tried at the first trial on the substantive charge, her collateral estoppel claim under *Ashe* v. *Swenson* would fail because an examination of the record of the first trial establishes that the conspiracy acquittal did not necessarily determine in her favor any fact required for conviction on the substantive count here at issue. The only disputed fact in connection with the substantive conviction was whether petitioner was a resident of California or New York at the time she acquired the firearm. The district court instructed the jury at the first trial that to find her guilty of conspiracy, it need not determine that she resided in New York, but only that one of the conspirators was a New York resident (1 Tr. 564-565). Kenneth Chin, the

alleged co-conspirator, was admittedly a New York resident (1 Tr. 465, 471). Moreover, the court charged that in order to convict Elizabeth Chin on the substantive count, the jury had to find that at the time of the events in question, she was a resident of New York (1 Tr. 550). Accordingly, had the jury resolved the residency issue in her favor in reaching its acquittal on the conspiracy charge as petitioner contends that it did, the court's instruction on the transportation count would have compelled the jury to acquit her on that count as well. The fact that it did not do so dooms petitioner's claim of collateral estoppel.

Petitioner also relies (Pet. 10) on *Sealfon* v. *United States*, 332 U.S. 575. That case does not support her position. In *Sealfon* the defendant was tried and acquitted of conspiring to defraud the United States by submitting false invoices. Subsequently, he was tried and convicted of aiding and abetting the submission of these same false invoices. In both instances, the government's case turned upon its contention that a letter from Sealfon to a co-defendant had been written pursuant to an agreement to violate the law. On the basis of an examination of "the facts adduced at each trial and the instructions under which the jury arrived at its verdict" (332 U.S. at 579), the Court concluded that the first jury's acquittal of the defendant on the conspiracy count could only have been based on a finding that the alleged illegal agreement did not exist. In those circumstances, this Court determined that Sealfon's conviction on the substantive charge depended upon a

fact necessarily adjudicated in his favor at the first trial and therefore reversed his conviction.

The instant case is dispositively different. Here petitioner's convictions on the substantive charges at the second trial did not depend on the existence of a conspiracy. For, unlike *Sealfon*, and contrary to petitioner's contention that she was "acquitted of the lesser offense" (Pet. 9), this is not a case where "the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense" (332 U.S. at 578-579). "Nothing in the Sealfon case indicates that a conspiracy acquittal in an earlier trial bars conviction at * * * a later trial of being an actual principal." *Robinson* v. *United States*, 175 F.2d 4, 10 (C.A. 9), certiorari denied, 338 U.S. 832; cf. *United States* v. *Curzio*, 170 F.2d 354 (C.A. 3).[7]

2. a. Petitioner Elizabeth Chin urges (Pet. 18-19) that the affidavit supporting the warrant issued

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[7] Elizabeth Chin also argues (Pet. 11) that retrial on a substantive count based on the evidence relating to the second AR-180 rifle (counts 3 and 4 of the second indictment) was barred by the Double Jeopardy Clause because the court withdrew that evidence from jury consideration at the first trial. That ruling, however, "was an evidentiary ruling only" (Pet. App. 13a), made by the court in a stated overabundance of caution (see 1 Tr. 489-505), "and did not determine the guilt or innocence of [Elizabeth Chin] with respect to the crimes charged" (Pet. App. 13a-14a). Accordingly, "the ruling [did] not bar prosecution for importing [*sic*] and receiving the subject weapon as charged in Counts Three and Four of the superseding indictment" (*id.* at 14a). In any event, the court dismissed the count charging receipt of that weapon and set aside petitioner's conviction for transporting it (*see* page 5, *supra*), so the matter is now moot.

to search her apartment was insufficient to establish probable cause to believe either that a crime had been committed or that a firearm was present at her residence.

On October 3, 1975, the Secret Service obtained a warrant to search petitioners' residence in Brooklyn, New York for a semi-automatic rifle. The warrant was issued on the basis of an affidavit executed by Secret Service Agent Neal Findley, stating that he had reason to believe that, in purchasing the weapon, Elizabeth Chin had used a driver's license which falsely represented that she was a resident of California.[8] In support of that belief, Findley stated that a Secret Service agent had been told by a salesman at Cole's Sporting Goods Store in Inglewood, California that on July 29, 1975, he had sold an AR-180 semi-automatic rifle, serial number S-12585, to Elizabeth Jane Young (Elizabeth Chin's maiden name) for $270 and that she had represented her address to be Los Angeles, California (Pet. App. 8a-9a, n. 3). The affidavit also related that postal records reflected her

[8] 18 U.S.C. 922(a)(6) provides that it is unlawful

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

change of address from California a year prior to the sale, first to Jackson Heights, New York, and subsequently to 925 Union Street, Apartment 4B, Brooklyn, New York (*ibid.*). Finally, the affidavit stated that petitioner was presently residing at the Brooklyn address (*ibid.*).

These facts were sufficient to warrant the conclusion that, when the weapon was purchased, Elizabeth Chin resided not in California, as she had represented, but in New York. Because it is unlawful for a dealer to sell a firearm without recording, *inter alia*, the purchaser's place of residence (18 U.S.C. 922(b)), the misrepresentation of residency was material. *United States* v. *Gudger*, 472 F.2d 566, 568 (C.A. 5); *United States* v. *Crandall*, 453 F.2d 1216, 1217 (C.A. 1). Accordingly, the affidavit provided probable cause to believe that petitioner Elizabeth Chin had committed a violation of 18 U.S.C. 922(a)(6).[9]

Moreover, the facts alleged supported the magistrate's conclusion that evidence of that crime—the semi-automatic rifle—would probably be found in petitioner's apartment. That conclusion required that the following inferences be drawn from the facts stated in the affidavit: (1) that Elizabeth Chin

[9] *United States* v. *Mendoza*, 487 F.2d 309 (C.A. 5), upon which petitioner relies (Pet. 19), is inapposite. That case involved the sufficiency of evidence to sustain a conviction, rather than sufficiency of allegations establishing probable cause to issue a search warrant. A showing of probable cause does not require proof sufficient to establish guilt. *Brinegar* v. *United States*, 338 U.S. 160, 173.

bought the weapon for her personal use (or at least that she did not dispose of it in California); (2) that she brought it with her from California to her New York home, or caused it to be brought there; (3) that she kept it in her home; and (4) that it was still there 66 days after she bought it. Of course, "[i]t was not necessary for the government to submit direct evidence that the firearm was on the premises to be searched. The probability that it was there is sufficient" (Pet. App. 10a). See *United States* v. *Mulligan*, 488 F. 2d 732, 736 (C.A. 9), certiorari denied, 417 U.S. 930; *United States* v. *Lucarz*, 430 F. 2d 1051, 1055 (C.A. 9).

The propriety of inferring the presence of a chattel in a person's home from a person's prior purchase of the chattel depends upon the facts of the particular case. It requires consideration of a number of factors, including the kind of chattel involved, the legality of the acquisition or possession of the chattel, the time interval between the acquisition and its presumed presence in the purchaser's home, and the likelihood that the purchaser transported the chattel to his home after the acquisition. The mere fact of purchase, standing alone, would not be sufficient to establish probable cause that the article subsequently would be found in the purchaser's home. "If that were so, there would be no reason to distinguish search warrants from arrest warrants, and cases like Chimel v. California, 395 U.S. 752 * * * would make little sense." *United States* v. *Lucarz*, *supra*, 430 F. 2d at 1055.

Although the question is close, we believe that the facts stated in the affidavit in this case justified the inference by the magistrate that there was probable cause to believe that the weapon would be found in Elizabeth Chin's home. The affidavit stated that the weapon had been purchased for $270—a considerable amount of money—and that, since purchasing the weapon, petitioner had returned to her home in New York. Furthermore, as the district judge stated, "[t]he likely place for concealment of a semi-automatic weapon"—as opposed to other things one might possess—"would be the owner's home" (Pet. App. 10a). Here, as in *Lucarz*, *supra*, "[t]he affidavit demonstrated the [purchase] of the sort of materials that one would expect to be hidden at appellant's place of residence, both because of their value and bulk. It showed that appellant had ample opportunity to make a trip home to hide" the weapon. 430 F. 2d at 1055.

In *United States* v. *Rahn*, 511 F. 2d 290 (C.A. 10), certiorari denied, 423 U.S. 825, the court of appeals concluded that there was probable cause to believe that a firearm acquired two years earlier would be found in the defendant's home. The court agreed with the district judge who, in upholding the search, stated, "It is reasonable to assume that his house was where he kept things and it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family." 511 F. 2d at 293. The court of appeals recognized that "[a]dmittedly there are other places where the guns *might*

have been stored; yet we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of appellant's residence." *Id.* at 294 (emphasis in original). As the Eighth Circuit recognized in a similar situation, "[P]eople who own pistols generally keep them at home or on their persons." *United States* v. *Steeves*, 525 F. 2d 33, 38. Accord, *Bastida* v. *Henderson*, 487 F. 2d 860, 863 (C.A. 5) ("A very likely place to find [handguns] would either be on the persons of the assailants or about the premises where they lived.")[10]

As this Court said in *United States* v. *Ventresca*, 380 U.S. 102, 109, "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should

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[10] Contrary to petitioner's assertion (Pet. 18), the fact that she had purchased the weapon in California 66 days earlier did not undermine that probability. As the district court correctly held (Pet. App. 10a-11a):

> Lapse of time is not the sole variable in determining whether the belief as to someone's possession of evidence is reasonable. A week might conceivably be too long a period for the search of perishable goods such as narcotics. The test to be applied must be the reasonable probability of whether [petitioner Elizabeth Chin] would likely have disposed of an automatic rifle, purchased under the circumstances in the case at bar, within the period of time which had passed. The expectation that the firearm was at the premises at the time of the warrant's issuance was not unreasonable. Cf. *United States* v. *Steeves, supra*, 525 F. 2d at 37-38; *Bastida* v. *Henderson*, 487 F. 2d 860, 864 (C.A. 5).

be largely determined by the preference to be accorded to warrants." See *Jones* v. *United States*, 362 U.S. 257, 270. In sustaining the sufficiency of this particular affidavit, the lower courts used the proper legal standard. The question of the correctness of the application of that standard to these particular facts does not warrant review by this Court.

b. Petitioner also challenges (Pet. 19) a misstatement contained in a supplemental affidavit submitted to the magistrate reciting the Secret Service's concern that her possession of the firearm in question might pose a threat to the safety of Emperor Hirohito of Japan, who was to visit New York City the next day. The affidavit stated, among other things, that during 1973 petitioner resided at a specified address in Los Angeles with Joanne Miyamoto (Amicus Br. of Asian-American Legal Defense and Education Fund, App. A5). As Agent Findley attested in a subsequent affidavit filed in connection with the suppression hearing prior to petitioner's first trial, this statement was not correct; in fact, petitioner and Miyamoto lived in adjoining houses (*id.* at A13).

The district court rejected this claim, ruling that the original affidavit was sufficient to establish probable cause and that any "alleged misstatements in the supplemental affidavit are therefore inconsequential" (Pet. App. 11a). While it is true that there is authority for the proposition that, in the case of deliberate misstatements in a search warrant affidavit, the warrant may be invalid even though the misstatement was not necessary to the establishment

of probable cause (*e.g.*, *United States* v. *Belculfine*, 508 F.2d 58 (C.A. 1); *United States* v. *Carmichael*, 489 F.2d 983, 988-989 (C.A. 7) (*en banc*)), there is no suggestion here that the misstatement was a deliberate misrepresentation. It was, at worst, a negligent misstatement, and since its content was wholly immaterial to the establishment of probable cause to believe that petitioner had violated 18 U.S.C. 922(a)(6)—the ground on which the magistrate issued the warrant—there is no support for petitioner's claim that the warrant was invalid on account of the misstatement. See, *e.g.*, *United States* v. *Evers*, 552 F. 2d 1119, 1122 (C.A. 5); *United States* v. *Taxe*, 540 F. 2d 961, 967 (C.A. 9), certiorari denied, 429 U.S. 1040.

3. Petitioner Elizabeth Chin also challenges one instruction given by the district court and its refusal to give another.

a. In accordance with the provisions of 18 U.S.C. 926, the Secretary of the Treasury has defined state of residence as "[t]he State in which an individual regularly resides, or maintains his home * * *. * * * Temporary sojourn in a State does not make the State of temporary sojourn the State of residence." 27 C.F.R. 178.11. By way of example, the regulations provide that a person may be a resident of more than one State (*ibid.*):

> A maintains a home in State X and a home in State Y. He resides in State X except for the summer months of the year and in State Y for the summer months of the year. During the time that he actually resides in State X he is a resident of State X, and during the time that he actually resides in State Y he is a resident of State Y.

Elizabeth Chin therefore contends (Pet. 12-15) that the district court erred when it charged that "residence is domicile" and that "you can only have one residence" for purposes of Section 922(a)(3) (2 Tr. 797). Those instructions, however, were not prejudicial in the context of this case.

Throughout the trial, Elizabeth Chin's defense was that, at the time she purchased the weapons in California, she had abandoned her residence in New York and had gone to California to relocate permanently (see 2 Tr. 80-83, 675-676).[11] She stayed in California for about a month and then returned to her Brooklyn apartment (2 Tr. 497; Pet. 5). At no time did she claim to maintain residence in both States; indeed, such a claim would have been fatal to her defense, see note 5, *supra*. The court's instructions (2 Tr. 797-800) accurately charged that under the circumstances of this case, the crucial issue was whether Elizabeth Chin had become a resident of California when she went there for several weeks in the summer of 1975. "[C]onsidered in the context of the entire record of the *trial*" (*United States* v. *Park*, 421 U.S. 658, 674-675, quoting from *United States* v. *Birn-*

[11] Neither petitioner testified. This defense was put in through other witnesses.

baum, 373 F.2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837 (emphasis in original)), the court's instructions on residency, to the extent mistaken, could not have affected the verdict and therefore did not deprive petitioner Elizabeth Chin of a fair trial. See *United States* v. *Jones*, 481 F.2d 653, 654 (C.A. 2).

b. Elizabeth Chin's further contention (Pet. 16-17) that the district court should have instructed the jury "that legitimate hunters were not the target" of Section 922(a)(3) is without merit since her alleged interest in hunting, even if proven, would be no defense to this charge.

The Gun Control Act of 1968 (82 Stat. 1213), of which Section 922(a)(3) is a part, does contain a stated purpose not to place "undue * * * Federal restrictions * * * on law-abiding citizens with respect to the acquisition * * * of firearms appropriate to the purpose of hunting * * *" (Section 101, 82 Stat. 1213-1214; Pet. App. 1a-2a). However, this objective was protected by wording the statute so as to permit sportsmen to transport firearms and ammunition purchased in their state of residence to and from interstate hunting sites, and by excluding "transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection [922](b)(3)." That subsection creates, *inter alia*, a specific, limited exception for non-resident hunters whose rifle or shotgun has been lost, stolen, or rendered inoperative in another state.

Petitioner has never suggested that her purchase and transportation of the rifle came within this exception. Accordingly, the claim that she may have been a hunter transporting the firearm for sporting purposes was irrelevant (cf. *United States* v. *Jones*, *supra*, 481 F.2d at 654-655). The district court properly excluded such evidence from the jury's consideration (see, *e.g.*, 2 Tr. 284-286, 295, 789) and correctly refused to instruct on congressional intent.[12]

4. Petitioner Kenneth Chin (No. 77-32) was convicted of unlawful receipt of the firearm purchased by Elizabeth Chin in California and of aiding and abetting her unlawful transportation of that firearm from California to New York. Upon our review of the record in this case, we have concluded that the evidence against Kenneth Chin was insufficient to sustain these convictions.

a. Under 18 U.S.C. 922(a)(3) it is unlawful, subject to exceptions not relevant here, "for any person

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[12] Petitioner seeks to bolster her argument by quoting (Pet. 16) from the floor debates on the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. However, Section 922(a)(3), as enacted therein, applied only to the sale or purchase of firearms other than rifles or shotguns. 82 Stat. 229. Subsequently, that Section was specifically amended in the Gun Control Act of 1968 to include rifles and shotguns in those provisions previously applicable only to handguns. See H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968). In so doing, Congress expressly recognized that the bill would affect sportsmen by restricting *interstate* purchases and transportation of firearms but stated that hunting pursuits otherwise remained unhampered. *Id.* at 9; see also 114 Cong. Rec. 21773 (1968) (remarks of Congressman Latta).

* * * to transport into or receive in the State where he resides * * * any firearm purchased or otherwise obtained *by such person* outside that State * * *" (emphasis supplied). The evidence in this case unquestionably showed that the firearm Kenneth Chin was convicted of receiving had been purchased in California and that he was at all relevant times a resident of New York; the fact that the firearm was seized from his apartment in New York also suffices to support the conclusion that he received it in New York. Nevertheless, petitioner argues (Pet. 7-8)—and we are constrained to agree—that these facts alone are insufficient to make out the offense of receiving under Section 922(a)(3); that provision also requires proof that the receiver was involved, either directly or as an accessory, in the out-of-state acquisition of the firearm. Otherwise, the words "by such person" would, in effect, be read out of the statute. See *Swain* v. *Pressley*, 430 U.S. 372.

The district court's charge to the jury on the receipt count was inconsistent with the foregoing reading of the statute, since the charge did not require the jury, in order to convict, to find that petitioner had been involved, directly or indirectly, in the acquisition of the firearm in California. This omission was a result of the court's belief that "receipt means coming into possession of or getting or acquiring from a source outside oneself. In other words, in order to receive, somebody has to give it" (2 Tr. 787). If the court were correct that the words "by such person" are inherently inconsistent with the concept of receipt so that the statute necessarily contradicts itself, a nice question of statutory construction would be presented. But since one can purchase or obtain a firearm in another state without leaving one's state of residence (*e.g.*, by mail order or through the agency of a third party), we conclude that the receipt provision of the statute is not rendered meaningless by the provision requiring involvement of the defendant in the out-of-state acquisition. Accordingly, we believe that the district court was not justified in avoiding the plain meaning of the statutory words "by such person."

b. Beyond the problem arising from the defect in the district court's instructions on the statutory elements of the receiving offense is the question—common to both Kenneth Chin's conviction for receiving and his conviction for aiding and abetting Elizabeth Chin's illegal transportation of the firearm from California to New York—of the sufficiency of the prosecution's evidence to establish Kenneth Chin's involvement in the acquisition and transportation of the firearm.[13] Our review of the record compels us to agree with petitioner that the evidence was insufficient.

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[13] In connection with the transportation count the court did instruct the jury that it could convict only if it found that Kenneth Chin "participated knowingly and willfully as an aider and abettor" (2 Tr. 791).

There was no direct evidence at trial [14] of Kenneth Chin's participation in the acquisition and transportation of the firearm; rather, the evidence showed that those acts were performed by Elizabeth Chin, and she conceded such at trial (2 Tr. 674). Kenneth Chin was implicated, if at all, by the inferences to be drawn from his relationship to Elizabeth Chin, their mutual interest in firearms, and their joint possession of this firearm at the time of its seizure from their apartment. It was on the latter element that the district court principally relied in allowing the case to go to the jury, instructing it that "if you find that the weapon was transported from California into New York you may infer from [Kenneth Chin's] possession that the defendant Chin participated in the transportation of that weapon" (2 Tr. 794).

In instructing the jury in this fashion, the district court had in mind (2 Tr. 621) the familiar principle that a jury may reasonably infer from the defendant's possession of recently stolen property, if not satisfactorily explained, that the defendant was the

[14] There was evidence at the suppression hearing that, upon his arrest, Chin admitted that he and Elizabeth Chin had been in California together, that she had purchased the weapons at his request because he did not have a California driver's license, and that he had brought them back to New York (Supp. H. Tr. 16, 18, 19, 29-31). The district court ruled that the statements had been knowingly and voluntarily made and would be admissible, although not at a joint trial (*id.* at 74-75). Petitioners were tried jointly, and the statements were not offered into evidence at trial. Had they been, the evidence would have been ample to sustain the jury's verdict.

thief (see *McNamara* v. *Henkel*, 226 U.S. 520; *Dunlop* v. *United States*, 165 U.S. 486), that the defendant knew the property had been stolen (see *Barnes* v. *United States*, 412 U.S. 837), or that the defendant transported or aided in the transportation of the property across state lines (see *Beufve* v. *United States*, 374 F.2d 123 (C.A. 5), certiorari denied, 389 U.S. 881; but cf. *Bollenbach* v. *United States*, 326 U.S. 607).

We do not doubt that all of the foregoing inferences are often reasonable or that the inference alone may in many cases suffice to sustain the validity of a conviction. For example, if a bank is robbed and the defendant is found several hours later in possession of the loot, experience and common sense impel us irresistibly to the conclusion, in the absence of a satisfactory alternative explanation, that the defendant was involved in the theft and asportation of the loot. But the weight of the inference necessarily depends upon the totality of the evidence in any particular case, and even where the inference is permissible it will not always suffice, standing alone, to sustain a conviction.

As applied by the district court—and, presumably, the jury—in this case, the inference operated to sustain the conclusion that because the firearm was found in Kenneth Chin's apartment, it is likely beyond a reasonable doubt that he aided in its transportation from California. But unlike the conventional case of unexplained possession of stolen property, the evidence at this trial showed that it was not Kenneth Chin who

purchased the firearm in California and transported it to New York—those acts were done by Elizabeth Chin. While the jury may well have suspected, given the relationship between the two petitioners, that Kenneth Chin had a guilty involvement in these activities, we are unable to say that such suspicion is strong enough to justify submitting the case to the jury, since there is on this record too great a likelihood that Elizabeth Chin bought the weapon in California and brought it home with her to New York without Kenneth Chin's knowledge, and that he simply accepted it from her there (which, as previously discussed, would not violate the receipt prohibition of the statute).

CONCLUSION

The petition of Elizabeth Chin (No. 77-26) should be denied.

We do not oppose the granting of the petition of Kenneth Chin (No. 77-32) for the purpose of reversing the judgment of the court of appeals and remanding the case to the district court with instructions to enter a judgment of acquittal.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term 1977

No. 77-26

ELIZABETH JANE YOUNG CHIN,
Petitioner,

—against—

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF AND APPENDIX TO BRIEF FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

October Term 1977

No. 77-26

ELIZABETH JANE YOUNG CHIN,
Petitioner,

—against—

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES

I.

The Double Jeopardy-Collateral Estoppel Issue

The Solicitor alleges that petitioner has failed to present a valid double jeopardy—collateral estoppel issue because:

1) Even though the first jury acquitted petitioner of any conspiracy or illegal agreement with the co-defendant Chin, the fact that it failed to agree on a verdict on the substantive charge based on the same evidence, permitted the whole case to be relitigated. This argument is advanced on the ground that the first jury could, if it so desired, have acquitted her on the conspiracy charge and convicted her on the substantive count. That verdict would have stood against a challenge of inconsistency because "consistency in verdicts is not required."

2) The first jury never really decided whether or not petitioner was a resident of New York at the time she transported one or more weapons from California to New York in that the jury failed to agree on the substantive count of the first indictment. It decided only that there was no agreement between the petitioner and Kenneth Chin to transport or receive the weapons in New York where at least one of the persons involved (Kenneth Chin) was a resident. Since the first jury did not finally resolve the residency issue, the argument goes, there is no collateral estoppel on that issue and petitioner's double jeopardy argument is doomed.

As to 1) above

Inconsistency in the decisions incorporated in the verdict of a single jury is expressly not repugnant as a doctrine of federal criminal law. See *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."

cf. *Hamling* v. *United States*, 418 U.S. 87, 101 (1975), cited by the Solicitor.

Further dicta in *Dunn*—to the effect that the same rule of inconsistency applies to successive prosecutions on different indictments—have been, on the other hand, decisively declared in error by this Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970). By the Court's ruling there on collateral estoppel, the government is henceforth precluded from relitigating any issue finally decided by a general verdict of a jury. The task then, in each criminal case where the claim of collateral estoppel is raised, is to determine what the general verdict of the jury involved; any issue necessarily decided by that verdict would not again be submitted to a new jury for decision. Moreover, *Ashe* directs an examination of the record of the prior

proceedings for the purpose of determining "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

The case of *United States* v. *McGowan*, 385 F.S. 956 (D.C.N.J. 1974), cited by the Solicitor, can be distinguished from the case at bar. In *McGowan* the defendant was indicted in a two-count indictment for violation of separate federal laws: (1) conspiracy to import marijuana into the United States (21 U.S.C. §§ 952(a), 960) and (2) conspiracy to distribute and/or possess marijuana with intent to distribute such marijuana (21 U.S.C. §§ 841(a) (1), 846). The jury acquitted the defendant on count 2 and disagreed on count 1. The District Court there was faced with two counts charging conspiracy violations of separate federal statutes. Insofar as there were different laws involving different factual proof, the District Court was correct in rejecting the application of collateral estoppel. However, insofar as the court held that the "jury acted irrationally" in acquitting on one count and disagreeing on the other, and insofar as it rejected the doctrine of collateral estoppel as a bar to retrial on the issues which the court thought decided by the acquittal, the court did not follow *Ashe* v. *Swenson*, which should be controlling in the case at bar. In order to protect its position, the *McGowan* court stated:

> "All relevant data simply fail to indicate that the jury must have found McGowan innocent of all conspiratorial involvement" (961).

In the case at bar, it is clear that the acquittal on the conspiracy count of the two-count indictment was a conclusive finding that petitioner at no time whatsoever agreed with, aided or abetted, or permitted Kenneth Chin to aid or abet her in the transportation or receipt of any weapon into the State of New York at a time when one or

the other were residents of that state. There could be no retrial on any issue which implied their joint illegal action in the transportation and receipt of the weapons described in the first indictment.

As to 2) above

The Solicitor argues that the failure of the first jury to acquit petitioner on the second and substantive count of the first indictment left open for further litigation the issue of her residency at the time when the weapon or weapons were "illegally" transported to New York City. Yet, in acquitting her on the first charge of conspiracy, the jury must have made a finding "at least partially" in favor of her claim that she had established a residence in California.

In order to acquit her on that charge, the jury had to over-ride prosecution evidence for their joint conspiracy; to wit: that petitioner and Kenneth Chin were both hunters, interested in hunting rifles; that they maintained and occupied an apartment together in Brooklyn, New York, in 1975 where three of the four weapons were found on October 4, of that year; that the fourth weapon, presumably obtained in California, was left for repair by Kenneth Chin while in petitioner's company at a hunting-gun shop in upper New York State in September, 1975.[1] The jury must, therefore have given credence and weight to evidence adduced from petitioner's father, who testified that in July of 1975 his daughter returned to her family home in California on a one-way ticket because she had a quarrel with Kenneth Chin and was going to start a new life in California where she filed for unemployment insurance and looked for work. When the jury acquitted petitioner of the conspiracy charge, it must have credited

[1] This same evidence was adduced at both trials.

this testimony of the father so that implicit in its verdict was the finding that the two (petitioner and Kenneth Chin) had gone their separate ways and were separated in the summer of 1975.[2]

The residency question is not, however, central to petitioner's double jeopardy claim. The double jeopardy arises from the fact that the superseding eight-count indictment, lodged immediately after her acquittal on the conspiracy charge, accused her of joint action with co-defendant Chin. Even though that indictment did not charge conspiracy in *haec verba*, it accused her of joint illegal action with the co-defendant in that the two together "knowingly and willfully" violated the law. Moreover, petitioner further asserts that the record of the second trial, itself, supports this contention since the issue of aiding and abetting—in this instance the aiding and abetting of her alleged illegal acts by Kenneth Chin—was argued to the jury. The court later instructed the jury that they could find from the evidence that he did aid and abet her (Tr. II 789-795). The finding was then confirmed when the jury found him guilty of both transporting and receiving weapons in violation of the statute and as a principal with her.

The theory of the government's case at both trials was that the crime of transporting and receiving the weapons transported from California to New York where both of them resided was a joint crime, conceived of and executed by the two acting in concert. This theory did not change after petitioner's acquittal of conspiracy. When the

[2] Although the government adduced substantially the same evidence at both trials, the court capriciously and prejudicially ruled that petitioner could not introduce evidence, through her father's testimony, of the quarrel, the one-way ticket, the looking for work and the unemployment insurance at the second trial. See p. 5a *infra*.

government brought in its new superseding indictment alleging only substantive counts, it continued to adhere to the same theory of the case.

At the second trial, the prosecutor argued in summation that the two acted together. (Tr. II 657, 658, 660, 716). The court underlined the prosecution's theory of the case by expressly instructing the jury on aiding and abetting (Tr. II 789-795), the court then submitted to the second jury the same theory of joint action on which the first jury had acquitted petitioner.

Although the Solicitor attempts to distinguish *Sealfon* v. *United States*, 332 U.S. 575 (1948) from the facts in the case at bar, the cases are startlingly similar. A distinction without a significant difference perhaps can be made in that Sealfon was tried alone and acquitted first for conspiracy (as was petitioner) to defraud the United States by presenting false invoices and thereafter at the second trial was charged with aiding and abetting the publishing of the same false invoices introduced at the conspiracy trial. The case at bar is analogous, except that at petitioner's second trial, the jury was instructed and found that she was aided and abetted by the co-defendant in her criminal activity—a finding which should have been deemed *res judicata* in her favor at the first trial. See *United States* v. *Williams*, 341 U.S. 70 (1951), concurring opinion of Justice Black p. 85.[3] Put conversely, the second jury verdict was a ruling that she could not have committed the crime without the aiding

[3] Although it is not necessary for decision in this case, petitioner is prepared to concede on the double jeopardy issue that a new trial might have been appropriate on a new indictment limited to the issue of whether she had acted alone in violating the statute. Again, however, petitioner would plead that a prior jury had ruled at least partially on the residence issue in accepting her leaving the bed and board of Kenneth Chin in New York as a temporary abandonment of her New York residence.

and abetting of the co-defendant who, by such aiding and abetting, became a principal. Just as in *Sealfon*, "the basic facts in each trial were identical." *Robinson* v. *United States*, 175 F.2d 4 (9th Cir. 1949) and *United States* v. *Curzio*, 170 F.2d 354 (3rd Cir. 1948), cited by the Solicitor, are inapposite. *Robinson* restates the federal rule that a criminal jury may render an inconsistent verdict. In *Curzio*, as distinguished from the case at bar, the substantive counts subsequently tried after an acquittal of the defendant on a conspiracy charge, did not necessarily involve a charge of joint illegal action as appears in the record of the instant case, cf. *United States* v. *De Angelo*, 138 F.2d 466 (3rd Cir. 1943).[4]

II.

As to the Validity of the Search Warrant

The Solicitor concedes on this issue that "the question is close." A review of the record, itself, discloses that the government has predicated its position on theories and law which have no foundation in fact in that record. The Solicitor states:

> "The warrant was issued on the basis of an affidavit executed by Secret Service Agent Neal Findley, stating that he had reason to believe that in purchasing the weapon Elizabeth Chin had used a driver's license which *falsely represented* that she

[4] Petitioner notes the Solicitor's confession of error as to the guilt of co-defendant and co-petitioner Kenneth Chin. "Our review of the record compels us to agree with petitioner [Kenneth Chin] that the evidence was insufficient." It was nonetheless the second jury's finding after submission of all the evidence, and the court's charge that that jury found that *both* defendants acted together and were guilty. The government must have believed it had a stronger case linking them and trying them together, since it had failed to convict petitioner when she was tried alone.

was a resident of California" (emphasis supplied) (Sol. Br. 10).

The Section of law allegedly violated requires a "false or fictitious . . . statement . . . misrepresented identification, intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale." (18 U.S.C. § 922(a)6). A perusal of the affidavit of Findley of October 3, 1975 (Amicus Brief of Asian-American Legal Defense and Education Fund, hereinafter Amicus Br., A1-A3) discloses no statement whatsoever by Findley that petitioner made any false or fictitious statement, nor that such statement was material or calculated to deceive. The affidavit is barren of any allegations that petitioner had in fact violated the law cited. At the very most, the affidavit alleges that petitioner bought a firearm in California and exhibited a driver's license bearing her true name, but having a California address when she had apparently moved from California to New York. No federal crime was alleged to have been committed and particularly no illegal intent was alleged; nor was she ever indicted under the section of law referred to merely by number (18 U.S.C. § 922(a)6).

It is necessary for the validity of a search warrant that illegal conduct of some sort be specifically described. This did not occur here; the affidavit, on this ground alone, was accordingly insufficient.

Moreover, even if it were to be presumed, *arguendo*, that Findley intended to state that petitioner had "falsely represented" her address with the intention to deceive, even then, there was no allegation that the crime committed bore any logical connection to the premises to be searched 3000 miles away from the scene of the alleged crime. In *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir. 1960), the court said:

". . . an affidavit is insufficient if the affirmations of fact bear no logical relevance to the commission of a crime on the premises to be searched."

The Solicitor sets forth a series of inferences which must be made to support "the magistrate's conclusion that evidence of that crime—the semi-automatic rifle—would probably be found in petitioner's apartment." [5]

The cases cited by the Solicitor to support the appropriateness of the inferences to be drawn that the rifle would be in petitioner's home, far from the place of purchase and 66 days later, are all inapposite. The affidavits there in question all involve more facts asserted in support of the warrant, and allegations, not only of the commission of a crime, but of serious crime. viz. *United States* v. *Mulligan*, 488 F.2d 732 (9th Cir. 1973) (burglary of a bank, items found in automobile connecting defendant to the burglary and $98,600 found buried near defendant's residence); *United States* v. *Lucarz*, 430 F.2d 1051 (9th Cir. 1970) (theft of mail, materials "one would expect to find hidden at appellant's place of residence because of their value and bulk"); *United States* v. *Rahn*, 511 F.2d 290 (10th Cir. 1975) (theft of firearms); *United States* v. *Steeves*, 525 F.2d 33 (5th Cir. 1975) (recent robbery of a bank); *Bastida* v. *Henderson*, 487 F.2d 860 (5th Cir. 1975) (armed robbery).

In addition to the affidavit of Findley discussed above, a supplemental affidavit which was sealed was submitted to the magistrate in support of the search warrant.[6] It was this affidavit which contained the admitted falsehoods.

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[5] Petitioner, of course, contends that "that crime" is never described in the affidavit.

[6] Upon motion of defense counsel, a substantial portion of its contents was revealed. A portion of the affidavit still remains sealed. (Amicus Br. A6-A7).

Findley had alleged that during 1973 petitioner had resided at a specific address in Los Angeles with Joanne Miyamoto. Findley stated that the source of his information was the examination of postal records *and* an independent examination by the Federal Bureau of Investigation. This was a pivotal allegation because it made the link to the inflammatory charge that petitioner was a threat to the Emperor of Japan. This was also the affidavit which contained the accusation that her "involvement . . . poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States." (Amicus Br. A6).[7] The allegation that petitioner had, at any time, lived with Ms. Miyamoto was untrue; any checking as alleged would have revealed this fact. It was a material and, if not deliberate, reckless statement with no justification, but the support it offered to the still more reckless attempt to link the petitioner to the prospect of an event that haunted the Secret Service.

The District Court in upholding the validity of the search warrant ruled that any misrepresentation or falsehood in the supplemental affidavit was inconsequential since the original affidavit was sufficient to establish probable cause. The court, however, had before it the vigorous contentions of defense counsel, supported by affidavit, that the government had demonstrated a "reckless disregard of the truth." See affidavit of William Leibovitz, p. 11a, *infra*.

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[7] Although the affidavit was sealed, the Secret Service advised the media that petitioner and the co-defendant posed a threat to the life of the Emperor of Japan. This occasioned front page newspaper coverage and wide publicity in New York and all over the world. A few days later the Secret Service withdrew from the case, and the first indictment charging only violation of 18 U.S.C. § 922(a)3 was filed.

Accordingly, it is puzzling to read the Solicitor's statement,

> "there is no suggestion here that the misstatement was a deliberate misrepresentation. It was at worse a negligent misstatement, and since its content was wholly immaterial to the establishment of probable cause to believe that petitioner had violated 18 U.S.C. 922 (a) (6)—the ground on which the magistrate issued the warrant—there is no support for petitioner's claim on account of the misstatement." Sol. Br. 16.

The cases cited by the Solicitor, *United States* v. *Evers*, 552 F.2d 1119 (5th Cir. 1977) and *United States* v. *Taxe*, 540 F.2d 961 (1976), refer only to omissions of fact in an affidavit, not to misrepresentations alleged to be material to the issues and recklessly made. Despite the fact that counsel raised the issue of good faith, there was no factual determination below of whether or not there was a reckless and material misstatement of fact. Petitioner's request for a hearing was denied.

The Second Circuit has ruled that a negligent misstatement will upset a warrant only if its allegations are material. *United States* v. *Bozza*, 365 F.2d 206, 223-224 (2d Cir. 1966); *United States* v. *Pond*, 523 F.2d 210 (2d Cir. 1976); *United States* v. *Gonzalez*, 488 F.2d 833-837, 838 (2d Cir. 1973). Other circuits have held that a false statement, even if not material, can "eviscerate the existence of probable cause." *United States* v. *Hunt*, 496 F.2d 888, 894 (5th Cir. 1974); cf. *United States* v. *Damitz*, 495 F.2d 50 (9th Cir. 1974); *United States* v. *Belculfine*, 508 F.2d 58, 60-63 (1st Cir. 1974); *United States* v. *Prewitt*, 534 F.2d 200, 202 (9th Cir. 1976). Since it was contended that the government had sought a search warant in bad faith, relying on the inflammatory nature of the accusation that petitioner threatened the life, safety and security of the Emperor of Japan, and

since any magistrate would be bound to give credence to a good faith accusation of such seriousness by the prestigious Secret Service, the court below should have, at the very least, held a hearing to determine this issue. Agent Findley's falsehood, claiming petitioner had lived with Joanne Miyamoto established the only link between petitioner and the visit to this country of the Emperor of Japan. Since there is a conflict in the Circuit Courts of Appeal on this issue, i.e. whether a negligent and/or immaterial—not to mention reckless and material—misrepresentation will invalidate a search warrant, the issue is important for decision by this Court.

III.

As to the Improper Instruction that "Residence" under the Statute Means Domicile

The Solicitor appears to concede that the trial court erroneously instructed the jury that, under the Statute (18 U.S.C. § 922 (a) 3), "residence" means "domicile" (Sol. Br. p. 18), but contends, nevertheless that such instruction "to the extent mistaken could not have affected the verdict." This was true, said the Solicitor, because petitioner's defense was that "she had abandoned her residence in New York" and had gone to California to relocate permanently. (Sol. Br. 17). Said the Solicitor,

> ". . . the crucial issue was whether Elizabeth Chin had become a resident of California when she went there for several weeks in the summer of 1975." (Sol. Br. 17)

Petitioner's position was not quite as set forth by the Solicitor. She contended at both trials that while she resided in New York she had a continuing residence in California where she was born and received her education and where her parents, imbued in the Chinese tradition

(she is a first generation American-Chinese), considered that the home of an unmaried female (she was unmarried in 1975) is always with her parents (Tr. II 516, 517, 9a *infra*). In addition, and in the alternative, she contended that she had abandoned her New York residence with the co-defendant Chin because she had quarreled with him and, at least in advance and for the several weeks she was in California, intended to remain in California indefinitely and secure employment there.

Based on these alternative theories of her defense, petitioner offered an instruction which the trial court denied:

> "As used in the statute 'residence' means broadly, presence as an inhabitant in a given place, not as a transient, but either indefinite as to time or for a purpose that is of such a nature that an extended stay may be necessary for its accomplishment, although the person may at all times intend to return to his or her domicile at some time in the future." (Request No. 4, Tr. II 580)

Moreover, petitioner further requested instructions to the jury consistent with regulations issued by the Department of the Treasury (Bureau of Alcohol, Tobacco and Firearms). See Petition for Certiorari 16, 17. If proper instructions on residence had been given, the jury could have considered the evidence concerning petitioner's residence in a different light—that she had two residences—one in New York, and the other in California, and that her move from the California residence to her New York residence (when she decided to return) was such that she was taking her belongings (including her hunting rifle) with her.

Instead, the court instructed the jury in strong language—equating domicile with residence and suggesting

the requirement of an immutable intention to establish a domicile which foreclosed any concept of dual residency. Viz.

> "Residence, as used in the statute is defined in legal terms as domicile . . . You can have any number of homes . . . But you can only have one residence, as I am defining it, for the purpose of this statute . . . Residence as used in this statute, means the place where the individual dwells, regarding it as his or her home as distinguished from other places. It is the place where one intends to live for an indefinite time . . . Domicile is usually the place where you have your personal effects, your belongings, your household goods, your valuables." (Tr. II p. 797-798)

The court went on in this vein at great length and, by its instructions, read out of the statute the possibility that a person might have two (or more) residences simultaneously. Moreover, because petitioner was in California for a relatively short period of time (a little more than four weeks), the court telegraphed to the jury that such a short period of time under the circumstances of this case could not mean a change in domicile which connotes a more permanent change.

In this regard, the court demonstrated its own prejudice against petitioner and her case; it foreclosed testimony about her reason for leaving New York and going to California—testimony which the court had permitted at the first trial. Appended pp. 1a-10a, *infra* are pages from the record of the first trial and the second trial which show how the court itself erroneously diminished petitioner's defense.

IV.

The Court's Disregard of Congressional Purpose and its Interference with Summation by Petitioner's Counsel

The Solicitor misdirects his argument on the issue of Congressional intention. That Congress, in fact, did not intend to unduly hamper the activities of legitimate hunters is clear from the floor debates in Congress on the Omnibus Crime Control and Safe Streets Act of 1968. Despite the amendment of the Act to include rifles and shotguns, Congress again took pains to make exceptions for hunters, showing its continuing concern that hunters themselves not be made targets of the proscriptive law. See Sol Br. 19, n. 12.

In its charge, the trial court did refer to the intent of Congress in passing the law, of which Section 922(a) 3 is a part. It said that the congressional purpose was "to closely supervise the manufacture, sale and transportation of certain weapons" (Tr. II 781), but refused, although requested, to mention the express Congressional intent and its preamble that made clear that the Act was not directed against legitimate hunters.

Evidence had been introduced by the prosecution that petitioner and the co-defendant were hunters, that they had state hunting licenses and disposition notices covering weapons in their possession, and that in addition, they paid their bills promptly (Tr. II 366, 373, 374-378, 420-423, 427, 320, 347, 402-406).

The Prosecution had also told the jury, without any foundation, that certain of the weapons were of a "military" character (Tr. II 6, 7). Nonetheless, not only did the court fail to mention the expressed intent of Congress not to make legitimate hunters the target of the criminal law, but it interfered with counsel's appropriate argument based on the evidence that had been adduced by the

prosecution—that defendants were hunters and law-abiding. The court compounded its error in this regard by intervening in the summation by defense counsel and criticizing her for making mention of these facts in evidence. This telegraphed to the jury the court's prejudice. Finally, in a manner which deprived the defendant of her attorney's advocacy and accordingly of due process of law, the court, having criticized counsel, dramatically interrupted the summation, sent the jury out of the room and threatened petitioner's counsel with contempt of court p. 18a, *infra*. The trial judge capriciously and unfairly forbid defense counsel from making legitimate argument. This was a deprivation of the right of the defendant to have her counsel sum up. *Herring* v. *New York*, 422 U.S. 853 (1976).

The Solicitor did not respond to this point which is set forth in the petition as part of Question 3.

CONCLUSION

The petition of Elizabeth Jane Young Chin should be granted.

Respectfully submitted,

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Attorney for Petitioner
Elizabeth Jane Young Chin

December, 1977

APPENDIX TO REPLY

Excerpts From First Trial of Testimony of Petitioner's Father, Charles Young on Issue of her change of residence

[339] Q. Did there come a time in 1975 when your daughter returned to Hanford? A. Last year, a little bit after the 14th of [340] July.

Q. That was 1975? A. 1975.

Q. What were the circumstances of that——

Mr. Levin-Epstein: Objection.

Q. Did you have a conversation with your daughter about her return when she returned to California in 1975?

Mr. Levin-Epstein: Objection.

The Court: I'll allow it. Yes or no.

A. She——

The Court: No, yes or no.

A. Yes.

Q. What was that conversation?

Mr. Levin-Epstein: Objection.

The Court: Does it relate to the reason for her return to New York?

The Witness: (No response.)

The Court: From New York?

The Witness: Yes.

The Court: Tell us what she said with reference to returning to California from New York?

The Witness: She said she's breaking up with Kenny and she wants to work in California.

[341] Did you have a conversation about where she would work? A. Yes.

Mr. Levin-Epstein: Objection. What does that——

Excerpts From First Trial of Testimony of Petitioner's Father, Charles Young on Issue of her change of residence

The Court: Overruled. I'll allow it.

Q. What was that conversation?

The Court: Objection sustained. Did she actually work in California?

The Witness: She was in Los Angeles. She stayed one week with me and she could not find employment. She signed for her unemployment insurance in Hanford and a check on unemployment. Of course at that time instruction——

The Court: No, I want to know whether she ever worked in California.

The Witness: I do not know. I do not know.

The Court: Did you offer her a job in one of your supermarkets?

The Witness: Yes, but she didn't want any part of it.

The Court: Go ahead.

Q. She stayed with you and—Strike that. Then did there come a time sometime after [342] she left your home and after she applied for unemployment insurance when you heard from her about going back to New York? A. Somewhere within about—a few weeks, about two or three weeks she called on the phone, she called on the phone and said she's going back to New York.

Q. When would you say that was? A. Oh, let's see, about the first or middle part of August, something like that.

Q. Then thereafter did she return as far as you know? A. Well, she called us and after she reached New York, she called us again saying she arrived.

* * * * *

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of Residence

[497] BY MS. PIEL:

Q. Did there come a time in 1974, when Mrs. —— or when your daughter returned to New York——

Mr. Levin-Epstein: Objection, as leading.

The Court: I will allow leading questions as long as they are proper.

Q. ——in 1976? A. Well, they not finding satisfactory work in Los Angeles——

Mr. Levin-Epstein: Objection, not responsive.

The Court: Strike it out as not responsive. Did she return to New York?

The Witness: She returned to New York.

Q. Did there come a time in 1975, when your daughter came back to Hanford, to your home? A. In middle July of '75, she came back home.

Q. And did she bring—strike that. Did she have a conversation with you about her intention at that time?

[498] Mr. Levin-Epstein: Objection.

The Court: Just yes or no.

Mr. Levin-Epstein: Objection withdrawn. Yes.

And what was that conversation about——

The Court: Objection sustained.

Ms. Piel: I'd like to be heard, your Honor.

The Court: The Jury may be excused.

(Jury excused.)

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

(The following occurred in the absence of the Jury.)

Ms. Piel: At this time, your Honor, I wish to ask this witness about his conversation with his daughter in 1975 to show her state of mind with regard to her intention to return to California to establish her residence, and it seems to me that is an exception to whatever rule or, rather, to any hearsay rule because it's not to show the truth of the matter, but her state of mind, and intention.

The Court: Isn't it true that on the state of mind of the defendant, as to whether she intended to reside in California, that is admissible?

Mr. Levin-Epstein: The Court's ruling at the last trial was such.

[499] I objected at that time on the basis of hearsay because I don't think it is possible to distinguish between state of mind and the testimony of this witness.

The Court: You are just assuming the witness is lying.

Mr. Levin-Epstein: Absolutely not. I think the opposite——

The Court: I am talking about his testimony concerning what his daughter said.

Mr. Levin-Epstein: I am afraid the Court misunderstood my point.

I don't object to the state of mind of Mrs. Chin —Miss Young being offered in evidence as part of the defendants' case.

Clearly, the isue of residence has to do with the state of mind, knowledge and intent.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

My only concern is that this witness, upon being asked questions such as the kind Ms. Piel is framing, is going to be volunteering to this Jury matters not within the scope of the case.

The Court: You are directed to answer questions concerning your daughter only as to what she said concerning her intention as to where she [500] was going to reside—not the reason—not that she had a fight with Kenneth Chin and that's the reason.

You may testify she said she was coming to California to stay.

Why, is not proper on state of mind.

Ms. Piel: It seems to me that the fact she said she had a fight with Kenny is appropriate to show her state of mind.

The Court: I won't take that. You have an exception.

Ms. Piel: She was living with Kenny and established her residency in New York—I haven't challenged that—as of 1974, and into the early part of '75, and the only basis on which one can show a state of mind is that for some reason she decided to establish a separate residence.

Therefore, it is very important to show that she had some disagreement.

The Court: I won't allow it. The reason for the state of mind is not the state of mind.

I will allow him to testify that she said she was coming to California.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

I will not permit any testimony over objection [501] by the Government that she had a fight with Kenny and therefore, she decided to come to California. And I don't want any testimony about his disapproval with the relationship.

You shall be confined to the issues in the case as is the Government and not the collateral issues.

Ms. Piel: I would like to make an offer of proof, that if permitted to testify, he would testify she had a fight, a disagreement with her husband, had a conversation with her father; that her father had expressed to her during that conversation that he disapproved of her living with a man to whom she wasn't married; had this fight with Ken over that issue, and told her father she was returning to California with a definite intention to reside either with him or in Los Angeles or somewhere in California.

The Court: I will allow so much of it that indicates that she intended to live in California permanently.

I will not allow his disapproval of the relationship or that she had a fight with Kenny and——

Ms. Piel: You allowed me to say that in my [502] opening statement and now my case is prejudiced——

The Court: Was there objection then?

Ms. Piel: No.

The Court: You are not allowed to introduce testimony because you made statements in your opening you shouldn't have made.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

Ms. Piel: The point is that it is relevant, not irrelevant.

The Court: I find it is not.

Seat the jury.

(Jury present.)

The Court: Proceed.

By Ms. Piel:

Q. Mr. Young, upon your daughter's return to California in the middle of July of 1975, alone, did she have a conversation with you? A. She wanted——

The Court: Did she have a conversation with you—yes or no?

The Witness: Yes.

Q. What was that conversation?

The Court: I wan' a leading question here.

Objection sustained.

Q. Did your daughter say to you that she was [503] returning to California to make her home with you or somewhere in California, and that she was leaving New York? A. Yes.

Q. And did she tell you that it was her intention to establish her residence in California? A. Yes.

The Court: Did she tell you she was giving up her New York residence and coming to California to live there?

The Witness: Yes.

Q. And did she stay with you for a period of time? A. About a week, 10 days.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

Q. And then what did she do? A. She left for Los Angeles.

Q. And how long did she stay in Los Angeles? If you know. A. About a month, I think.

Q. And did you receive a telephone call from her at some point? A. About the middle of August.

Q. And did she—and did you later then receive a telephone call from her from New York? A. After she got back to New York.

* * * * *

Cross examination by Ethan Levin-Epstein

[516] Q. Would it be fair to say, sir, that when you speak of your "home," that in your mind your home, again in quotations, will always be at least in one respect all of your children's home? A. Yes.

Q. And would it also be fair to say, sir, that when you speak of your residence—let's leave it at that—your residence in your business dealings, you have a different meaning in your mind than when you speak of "My daughter is coming home," or words to that effect? A. The Chinese is a little different. Until our children are married, even they are 80 years old, this [517] is their home.

Q. As far as you're concerned; is that correct? A. Right.

Q. And this is a tradition longstanding within the culture; is it not? A. Yes.

Q. And yet, when your daughter graduated from college, although there was always a place for her in your home, as you put it, she moved to New York, did she not? A. Against our wishes.

Q. But she did, nevertheless? A. Yes.

* * * * *

[523] The Court: Mrs. Piel.

Ms. Piel: Yes, I would like to be heard before I proceed on redirect.

The Court: The jury is excused.

(At 11:10 A.M. the jury left the courtroom.)

Ms. Piel: Your Honor will recall earlier in my [524] offer of proof, after you sustained my objection——

The Court: I heard everything you said, so start from there.

Ms. Piel: I said that this witness would testify that Elizabeth Jane Young Chin or Young then,

came home and said she had a fight with her—with Kenneth and that she had come home to California to live.

Now your Honor excluded or directed this witness not to mention anything about either the fight or his disapproval of their relationship——

The Court: That is right.

Ms. Piel: Now Mr. Levin-Epstein—and you directed the witness not to say it even if I were to ask the question——

The Court: I heard everything I said. I was listening very carefully to everything I say——

Ms. Piel: Now Mr. Levin-Epstein asked this witness on cross-examination, Did Miss Young say to her father I want to live with you forever.

Now when he asked that question, he opened the door for me to ask Mr. Young on redirect what the conversation was.

I submit I now have a right to ask Mr. Young and Mr. Young now has a right to answer me that in the [525] conversation he had with his daughter she reminded him or he reminded her of his disapproval of that relationship and she said, "Yes, I had a fight with him on that issue and I have returned to California"?

The Court: Mrs. Piel, I don't think it means a tinker's dam to either side, but you are very persistent and I will not give you your point just because you are repeating and arguing vigorously for it.

Denied. I don't think it means anything in this case, but you are not going to get your point just because you are arguing for it and just because you repeat it now.

Seat the jury.

* * * * *

Affidavit of William Leibovitz Filed in support of petitioner's motion to suppress

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

I, William Leibovitz, having been duly sworn depose and say:

1. I submit this supplemental affidavit in support of the motion by defendant Kenneth R. Chin to set aside the search warrant and to suppress and return evidence obtained by unlawful search and seizure.

2. Since the filing of my original affidavit, sworn to on December 12, 1975, the government has in part disclosed to defense counsel the contents of the supplemental affidavit of Special Agent Neal Findley, which was considered by the Magistrate who issued the search warrant herein. Paragraph 2 of the latter affidavit has been deleted and remains undisclosed to counsel and defendants. The government informed this Court on December 19, 1975 that it would rely only on the public affidavits, and not on the undisclosed portion, in the Court's determination of this motion.

3. The government also conceded to the Court on December 19, 1975, that no information beyond the foregoing affidavits of Agent Findley was presented to the Magistrate who issued the warrant.

4. On information and belief based on my discussions with Kenneth R. Chin, my own investigation, and my conferences with counsel for codefendant Young who, in turn, have discussed this matter with each other as attorney and client, the public portion of the supplemental affidavit of Agent Findley contains material misstatements that are intentionally, recklessly, or negligently untrue on the part of the affiant.

5. Paragraph 5 of the aforesaid affidavit asserts, as a ground for issuance of the warrant, that the defendants

were connected with a "serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States." In fact, such was never the case, which Agent Findley had ample opportunity and reason to learn and know in the ordinary and prudent exercise of his duty.

6. The intended visit of the Japanese Emperor to the United States was obviously known well in advance by the Secret Service. The Secret Service also knew where the defendants resided in Brooklyn, New York. Moreover, it claims to have had sufficient opportunity to investigate codefendant Young's postal records in California (Suppl. Affidavit, par. 1). Nevertheless, Agent Findley gives no evidence of having conducted any surveillance of the defendants personally to determine the truth or falsity of the claim made in his affidavit that the defendants were connected with a threat to the Emperor's or others' personal safety.

7. Both before and after the arrival of the Japanese Emperor the government, including Agent Findley and other agents, would have had every opportunity to establish close personal surveillance of the defendants in order to detect any relevant suspicious conduct. Every action of the defendants outside of their residence could have been followed 24 hours per day. Any meeting of the defendants with other persons suspected of any wrongdoing could readily have been noted through such surveillance. Any threatening behavior could thereby easily have been observed by Agent Findley and other trained agents of the Secret Service.

8. Moreover, in particular, the slightest effort by the defendants to go anywhere or do anything that appeared, however remotely, to be preparatory to making any physical contact with or otherwise causing any threat to the Japanese Emperor could instantaneously have been followed inch by inch through appropriate surveillance.

9. Nevertheless, Agent Findley recklessly disregarded these obvious means of learning the facts. His affidavits contain no evidence that he pursued any surveillance of the defendants themselves to determine the truth. Instead, his supplemental affidavit relies on irrelevant references to other persons, supposedly affiliated with "extremist" groups, one of whom allegedly was acquainted with co-defendant Young in the past, but who are not alleged to have any other relevant connection with her or with defendant Chin.

10. A good faith effort by Agent Findley to determine the available facts would readily have negated his "opinion" that the defendants posed a threat to the Japanese Emperor. In fact, immediately after execution of the search warrant and even before the defendants' arraignment by the U.S. Magistrate, the Secret Service removed itself permanently from the case and transferred it to the Bureau of Alcohol, Tobacco and Firearms. If the defendants had been found to pose a threat to the Emperor, the Secret Service by law would have been obligated to maintain responsibility. At the time of such transfer of the case, the Emperor was still in New York City and was scheduled to remain in the United States, and did so, for several additional days. The defendants were released on bail before the Emperor's departure from the United States. No charges were brought against the defendants, either in the original complaint or in the pending indictment, relating them in any respect to a threat upon the safety of the Japanese Emperor or others.

11. What would have been revealed to Agent Findley by any good faith, direct surveillance of the defendants is exemplified by the provable events of October 4, 1975, on the morning of their arrest. While their residence was being searched Ms. Young was attending a weekly four-

hour class in plumbing at Local No. 1 of the Plumber's Union in Brooklyn, New York where she has been an indentured trainee of the Union. Such facts were and are readily verifiable by the government. At the same time defendant Chin was doing the weekly household shopping and was arrested upon returning to the residence carrying large bundles of groceries. Such were the defendants' activities on the first day of the Japanese Emperor's arrival in New York City. Obviously, they were not engaged in threatening the safety of His Excellency, as Agent Findley had alleged without benefit of any previous direct surveillance of these defendants. His failure to conduct any such surveillance before swearing to an "opinion" of the serious threat allegedly posed by them was a reckless disregard of the truth.

12. There has been no explanation by the government of the leak to the press which alerted various news media crews to be present at the scene of the execution of the search warrant on the morning of October 4, 1975. This incident immediately created prominent self-serving publicity for the Secret Service during a period in which that agency was actively undergoing substantial adverse publicity (and possibly undeserved) due to various unrelated mishaps in the performance of its duties. However, three days later The New York Times published an article concerning the arrest of these defendants, entitled: "No Link to Hirohito Seen in Arrest of 2" (N.Y. Times, Oct. 7, 1975, p. 39, col. 6.).

13. Paragraph 1 of Agent Findley's supplemental affidavit contains an additional specific material misstatement. It alleges that the Secret Service investigated postal records and found that in 1973 codefendant Young had "resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto." The affidavit later characterizes Joanne Miyamoto as a questionable political activist, thereby seeking to establish a suspect relationship with codefendant Young by association.

14. On information and belief as set forth herein in paragraph 4, the aforementioned allegation of paragraph 1 of Agent Findley's affidavit is untrue. Codefendant Young resided at the said address, but Joanne Miyamoto did not reside there. Ms. Miyamoto resided at a separate residence with a separate address bearing no resemblance to the address of Ms. Young. Any postal records indicating the said residence of Ms. Young as the residence also of Joanne Miyamoto would be entirely false. It is submitted that no such postal record ever existed and that none was ever "revealed" to the Secret Service as alleged in the Findley affidavit. Such allegation is, therefore, false and was intentionally or, at best, recklessly misstated by the affiant.

WHEREUPON it is respectfully requested that the motion herein be granted or that a hearing be held to determine the facts.

/s/ WILLIAM LEIBOVITZ
/s/ WILLIAM LEIBOVITZ

Sworn to before me this
9th day of January, 1976.

/s/ Bertha V. Siegel

BERTHA V. SIEGEL
Notary Public, State of New York
No. 03-8987435
Qualified in Bronx County
Commission Expires March 30, 1976

Excerpts from Summation at second trial of Eleanor Jackson Piel, petitioner's counsel

[677]

* * * * *

Accordingly, she had every right not only to purchase the firearms but when she changed her mind or when she decided that she was going to return to New York, she was then changing her residence from California to New York and she had every right to take those two weapons to New York and the only way that you could—by any stretch of the imagination—be able to find Miss Young guilty would be to say that you disapprove of the fact that she is interested in weapons.

Now, you also heard from Mr. Benedicto, the Government's witness, that Miss Young, along with Mr. Chin, were hunters.

No one of you were asked individually what your opinion is of hunting. Personally I'm not a hunter, I don't like to hunt——

Mr. Levin-Epstein: I object to any extended argument on hunting.

The Court: Hunting has nothing whatever to do with this case. This case involves the transportation of guns from outside the State of [678] New York inside New York State, by a resident of New York State. It doesn't matter the reason. If you have no right to bring it in, then the reason you bring it in is irrelevant.

I ask you to not talk about Miss Young's or Mrs. Chin's hunting activity and would you do that as a personal favor.

Ms. Piel: As a personal favor, I cannot do it. If the Court directs me—

The Court: Then do it by direction of the Court.

Excerpts from summation at second trial of Eleanor Jackson Piel, petitioner's counsel

Order has not yet, during this trial, brought you into line, so I will order you not to.

Ms. Piel: Incidentally, ladies and gentlemen, I feel very deeply about this, ladies and gentlemen, and I hope there is not anything I have done in any way that will prejudice my client.

If I have made any mistake in anything that I have said, if I have in some way offended his Honor—

The Court: Nothing personal, Mrs. Piel, but I have a duty to manage this case and you have a duty to obey the directions of this Court and you, as a lawyer, should know that.

[679]

Now, continue.

Ms. Piel: I think that it cannot help but be in your mind that behind all of this, why is the Government bringing this case against these two law-abiding citizens, if they are engaged in legitimate activities and it was for that reason that I mentioned what I was not supposed to mention—

Mr. Levin-Epstein: Objection.

The Court: Objection sustained. Totally improper remark.

Deal with the evidence, Mrs. Piel.

Ms. Piel: I am doing my best, your Honor.

Why did the Government bring this case—

The Court: The Jury may be excused. I will call you right back in a moment.

(Jury excused. The following occurred in the absence of the Jury.)

Excerpts from summation at second trial of Eleanor Jackson Piel, petitioner's counsel

The Court: Ms. Piel, from the outset of this trial, you just refused to obey the orders of this Court.

Now, I have only threatened two lawyers in contempt of Court, never a woman before. You may well be my first one. Don't press it. You know it is improper to talk about selective [680] prosecution. There is no proof of that in the record. You have no right to talk about these law-abiding citizens. There isn't even any proof in the record that they are law-abiding citizens but I assume it is.

I quoted Judge Feinberg's decision or the portion of the decision in U.S. v. Jones, which says that kind of argument borders on the frivolous and I told you not to discuss that—not to talk about your clients as being law-abiding citizens, hunters, sportsmen and so forth.

You continue to violate the directions of this Court. I don't know how else to handle it.

I reprimanded you in front of the Jury and that seemed to do you no good at all, nor me.

Now, bring the Jury in.

I will seat you down in front of the Jury if you do it again.

(Jury present).

The Court. Now, please continue.

Ms. Piel: The evidence that the Government has presented on each one of the counts against Elizabeth Jane Young Chin is insufficient as a matter of law and as a matter of fact.

MOTION FILED
SEP 23 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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No. 77-32

KENNETH R. CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION OF THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Asian-American Legal Defense and Education Fund respectfully moves, pursuant to Rule 42 of this Court's rules, to file the within brief amicus curiae. Counsel for the petitioners have consented to the filing of this brief; the Solicitor General has not responded to our request for consent.*

The Asian-American Legal Defense and Education Fund is a national organization of attorneys, law students, legal workers and concerned citizens committed to protecting the civil rights of Asian-Americans through litigation. The issues in this case have broad significance for the Asian-American community. Our major concern centers on the racially prejudicial inferences contained in the affidavit of the United States Secret Service to support their search warrant application. Furthermore, this case raises important questions concerning the legal standard to be applied in determining the sufficiency of search warrant affidavits containing false statements. Since these issues have ramifications that extend beyond the particular case before the Court, we seek the opportunity to present our views on this matter and respectfully move for leave to file this brief.

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* Copies of the letters from petitioners and the request for consent from the Solicitor General are being lodged with the Clerk.

Respectfully submitted,

BENJAMIN GIM
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and Education Fund
43 Canal Street
New York, New York 10002

Attorney for Amicus Curiae

September 22, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE ASIAN-AMERICAN LEGAL DEFENSE
AND EDUCATION FUND AS AMICUS CURIAE

Interest of Amicus Curiae

The Asian-American Legal Defense and Education Fund is a national organization committed to defending the civil rights of Asian Americans through litigation and education. A particular concern of the organization is the protection of rights guaranteed under the First and Fourth Amendments which assure freedom of association and the freedom from unlawful government intrusions. The Asian-American Legal Defense and Education Fund believes that this case will have a profound effect upon the exercise of these constitutionally protected rights by members of the Asian-American community.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The arrest of petitioners received nationwide attention when the media reported their participation in an alleged conspiracy to assassinate Emperor Hirohito of Japan during his visit to the United States in 1975. These arrests took place in the context of two well-publicized attempts on President Ford's life only one month before, and in a climate of public concern about the security of government officials and foreign dignitaries. In particular, the United States Secret Service had come under severe attack and close public scrutiny for its failure to perform its duties effectively.

In the instant case, the false and misleading statements by a Secret Service agent ultimately led to an illegal search of the petitioners' home and their subsequent conviction on unrelated charges for the illegal transport of weapons across state lines.*

The media's sensationalism in reporting this case has had a severe impact on the image of Asian-Americans and the political climate in Asian-American communities. Asian-Americans have in the past been portrayed in the media as the "Yellow Peril" and a threat to national security in times of war. When public opinion is directed adversely against minority groups, the rule of law becomes more vulnerable, and constitutional safeguards are compromised. For Asian-Americans, this tragic lesson was brought close to home when Congress and the courts upheld the internment of Japanese Americans during World War II solely because of their Japanese ancestry. See Korematsu v. United States, 323 U.S. 214 (1944).

The petitioners have demonstrated their dedication and commitment to serve the Asian-American community and have no prior criminal record. The Secret Service's accusations of the petitioners' involvement in an alleged assassination plot stemmed from an attempt to draw tenuous connections between the petitioners and "political extremists"--a connection that ultimately was abandoned because of the

*For the purposes of this brief, the amicus curiae adopts the statement of facts set forth in Petitioner's Brief at 3-8.

total absence of proof. Many Asian-Americans working in their communities come into contact with other Asians of different political persuasions. Mere association with political activists must not be used as the basis for subjecting Asian-Americans to unlawful government harassment.

II.

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUITS OVER THE SUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT CONTAINING FALSE STATEMENTS.

At present, the circuit courts of appeals are divided on the issue of whether a search warrant is valid if the underlying affidavit contains misrepresentations. Four circuits have held that a negligent material misrepresentation in an affidavit does not justify the suppression of evidence. Instead, the law enforcement officer must have been reckless in his misrepresentation in order for the search warrant to be invalidated. United States v. Carmichael, 489 F.2d 983, 987-90 (7th Cir. 1973); United States v. Lee, 540 F.2d 1205, 1208-09 (4th Cir.), cert. denied, 97 S. Ct. 255 (1976); United States v. Luna, 525 F.2d 4, 6-9 (6th Cir. 1975), cert. denied, 96 S. Ct. 1459 (1976); United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974). In addition, the Sixth Circuit has ruled that if the false statement was made with an intent to deceive, the search warrant is invalid, even though the misrepresentation was not material. United States v. Luna,

supra. The Second, Fifth and Tenth Circuits have adopted a contrary standard and would quash a warrant where any material misrepresentation had been made. United States v. Pond, 523 F.2d 210, 213-14 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976); United States v. Thomas, 489 F.2d 664, 667-72 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1976); United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972). The Second Circuit has further held that if the false statement was made intentionally, the warrant should be invalidated even though the misrepresentation was not material. United States v. Pond, supra.

The search warrant in the instant case was issued on the basis of two affidavits--the "Affidavit for Search Warrant" (hereinafter "Original Affidavit") (A-1)* and "Supplemental Affidavit" (A-4) --submitted by Special Agent Neal Findley of the United States Secret Service on October 3, 1975. The Supplemental Affidavit contained the allegation that petitioner Elizabeth Jane Young Chin resided at 4303 Arlington Avenue in Los Angeles, California with Joanne Miyamoto in 1973. Agent Findley later conceded that this statement was false. In an affidavit submitted on January 28, 1976, to petitioner Kenneth R. Chin's lawyer, Findley stated:

> it is true that Joanne Miyamoto did not reside at that address; however, she did reside in an adjoining two story house at 2208-43rd Street immediately

*"A-___" refers to the Appendix attached to this brief amicus curiae.

> around the corner from the one-story residence of Ms. Young at 4304 Arlington Avenue.
>
> Reply Affidavit of Neal Findley, January 28, 1976 (A-13).

With regard to the false statement, the district court found that "the /original/ affidavit in support of the warrant is sufficient. The alleged misstatements in the supplemental affidavit are therefore inconsequential." * By affirming the district court's decision without opinion and thereby adopting the ruling below in all respects, the Second Circuit failed to consider the materiality of or the intent with which the false statements were made.

Agent Findley admitted to "the haste with which the information was gathered and the supplemental affidavit was prepared." (A-3). The pressured atmosphere surrounding the affiant's investigation strongly suggests that his misstatements were made knowingly and intentionally. The supplemental affidavit does not charge the petitioners directly with involvement in a conspiratorial plot to assassinate the visiting Emperor. Instead, Agent Findley piled inference upon inference in an attempt to connect petitioners with individuals who were termed "political extremists." The series of linkages set forth in the Supplemental Affidavit formed a tenuous chain: petitioner resides with Joanne Miyamoto in 1973; Miyamoto is a member of Asian Americans for Action; Mary Kochiyama,

*See Memorandum Decision and Order Denying Motion to Suppress, quoted in Petitioner's Brief at 11a.

also a member of Asian Americans for Action, is a contact for extremist groups, including the Black Panther Party and the Black Liberation Army. (A-5 to A-6). These "supplementary" statements so inflamed the magistrate that an impartial determination of the sufficiency of the original affidavit was all but impossible. Agent Findley's misstatements were based on mere suspicion and could only have been made with reckless disregard or with intent to deceive the reviewing magistrate. In view of the severity of the crime implied--conspiracy to assassinate the Emperor of Japan--greater attention to the reliability of the affiant's information was required.

The elimination of the false statement and the assessment of the affidavit's sufficiency in light of the remaining allegations opens the door to overzealous officials who would have "everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication blur the distinction between fact and fancy." United States v. Belculfine, 508 F.2d 58, 60-63 (1st Cir. 1974). See also United States v. Morris, 477 F.2d 657, 662 (5th Cir.), cert. denied, 414 U.S. 852 (1973). Such misstatements by Agent Findley were material and intentional, and resulted in a violation of the petitioners' Fourth Amendment rights.

III.

A SEARCH CONDUCTED UPON THE ISSUANCE OF A WARRANT FOR WHICH THERE IS NO PROBABLE CAUSE IS PATENTLY ILLEGAL.

No probable cause existed for the issuance of a search warrant based upon information submitted by Agent Findley. The failure of the district court (and, by adoption of the lower court's opinion, the Second Circuit) to consider the Supplemental Affidavit in its finding of probable cause was improper. The Supplemental Affidavit cannot be severed from the original since they were simultaneously submitted by the same affiant on the same date. Furthermore, they were read and considered together by the magistrate in his determination of probable cause. The mere designation of allegations as a "Supplemental Affidavit" does not detach the allegations therein from being read together with the original affidavit as one continuous whole. Paragraph 5 of the Original Affidavit (A-3) in fact incorporates the Supplemental Affidavit within the original.* Moreover, severance can only result in a legal fiction that provides no assurance that the magistrate, who had both affidavits before him, was not unduly influenced by the highly inflammatory assertions made in the Supplemental Affidavit. See Bruton v. United States, 391 U.S. 123 (1968).

---

*Paragraph 5 of the Original Affidavit provides as follows:

> 5. Additional grounds to support the issuance of a search warrant for the above-described premises are contained in a Supplemental Affidavit of your deponent which is submitted herewith.

The allegations in the Original Affidavit are not indicative of any violation of 18 U.S.C. § 922(a)(6).* The mere purchase or possession of a weapon is no inference of false identification in violation of the statute. United States v. Mendoza, 487 F.2d 309 (5th Cir. 1973).

* 18 U.S.C. § 922(a)(6) provides that:

> It is unlawful * * *
>
> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness or the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

In paragraphs 2 and 3 of the Original Affidavit, the affiant makes no explicit assertions of his personal observation of Postal Service records.* He also failed to assert the underlying circumstances that would reveal the source of the inform-

*Paragraphs 2 and 3 of the Original Affidavit provide as follows:

> 2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California drivers license, H-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.
>
> 3. Further investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

er's information or present any objective evidence that the unnamed informant is credible or that his information is reliable. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1944). Agent Findley submitted petitioner's notification to United States Postal Service officials of a change of address from Los Angeles, California to Jackson Heights, New York on June 11, 1974, and of a subsequent change from Jackson Heights, New York to Brooklyn, New York on August 30, 1974, as evidence that petitioner continued to reside in New York on July 29, 1975--the date of the purchase of the firearms. Since notification to the Postal Service is not a requirement but merely a convenience, it cannot be used as proof that petitioner did not move to California after August 30, 1974.

Affiant's statement in paragraph 4 of the Original Affidavit* that petitioner resided

* Paragraph 4 of the Original Affidavit provides as follows:

> 4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

"presently" at 925 Union Street was not based on observation of her physical presence, but merely of a surname on the mailbox. The surname "Young" is common to numerous individuals, Asian and non-Asian alike. It is not legally probative of petitioner's residence at that time. Together with the information regarding the postal records, the affiant attempted to demonstrate that the petitioner resided at 925 Union Street in Brooklyn on October 3, 1975 and, by inference, on July 29, 1975. A prudent person could reasonably conclude that sometime between August 30, 1974 and October 3, 1975--and specifically on July 29, 1975--the petitioner resided in California. Thus, the Original Affidavit contained no reasonable basis to believe that a crime had been committed in violation of 18 U.S.C. § 922(a)(6).

The Supplemental Affidavit neither alleges the commission of a crime nor contributes to the factual basis for the crime alleged in the Original Affidavit. Yet, it is the supplemental affidavit that contains the statements connecting the petitioner by race alone to "political extremists." Once the petitioner was acknowledged to have been only a neighbor of Miyamoto rather than a co-resident, the only linkage between the two was that of their race. The chain of inferences then collapsed and, as discussed above, probable cause for the issuance of the warrant became conspicuously lacking.

CONCLUSION

The Second Circuit failed to apply the proper standard when it affirmed the district court's finding of probable cause in the issuance of the search warrant. The Government should not have been permitted to make prejudicial inferences based on race or political association that have no legal probative value, and which ultimately colored the magistrate's determinations. This Court should issue a writ of certiorari to review the judgment below.

Respectfully submitted,

BENJAMIN GIM
Asian-American Legal Defense
and Education Fund
43 Canal Street
New York, New York 10002

Attorney for Amicus Curiae*

On the brief:

Kenneth Chu
Margaret Fung
Stanley Mark
Lisa Yee

September, 1977

APPENDIX

APPENDIX

AFFIDAVIT OF NEAL FINDLEY FOR SEARCH WARRANT SWORN TO OCTOBER 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x
UNITED STATES OF AMERICA

-against-

PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING,

Defendant.
----------x

AFFIDAVIT FOR SEARCH WARRANT

EASTERN DISTRICT OF NEW YORK, SS:

NEAL FINDLEY, being duly sworn, deposes and says that he is a Special Agent of the United States Secret Service, duly appointed to law and acting as such.

Your deponent has reason to believe that within the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING, within the Eastern District of New York, there is now being con-

cealed a firearm, to wit, one AR-180 semi-automatic rifle, bearing serial number S-12585, which firearm constitutes evidence of a violation of Title 18, United States Code, Section 922(a)(6).

The source of your deponent's information and the grounds for his belief are:

1. An interview by Special Agents of the United States Secret Service of Carl V. Copeland, Jr., a salesman at Coles Sporting Goods Store, Inglewood, California, a licensed firearms dealership, wherein he stated that he sold the above-described firearm, serial number S-12585, for $270 to a person who identified herself as Elizabeth Jane Young on July 29, 1975.

2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California drivers license, H-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Service authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.

3. Further investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service

officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

5. Additional grounds to support the issuance of a search warrant for the above-described premises are contained in a Supplemental Affidavit of your deponent which is submitted herewith.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent or any Special Agents of the United States Secret Service to search the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING and to seize the above-described firearm and any other evidence relevant thereto.

/s/ Neal Findley
S/A Neal Findley, U.S.S.S.

Sworn to before me this
3rd day of October 1975

VINCENT M. CAPOGGIO

A TRUE COPY

SUPPLEMENTAL AFFIDAVIT OF NEAL FINDLEY FOR SEARCH WARRANT, SWORN TO OCTOBER 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against-

PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING,

Defendant.
----------x

SUPPLEMENTAL AFFIDAVIT

EASTERN DISTRICT OF NEW YORK, SS:

NEAL FINDLEY, being duly sworn, deposes and says that he is a Special Agent of the United States Secret Service, duly appointed according to law and acting as such.

This Supplemental Affidavit is submitted in connection with and in support of an application for a search warrant for the above-described premises. A search warrant is sought in connection with an investigation surrounding the official visit of Emperor Hirohito of Japan to the United States and, more particularly, to the City of New York which is currently scheduled to take place between the 4th day of October

1975 and the 7th day of October 1975. The additional grounds to support the issuance of the search warrant are as follows:

1. Investigation by Special Agents of the United States Secret Service which revealed that during the year 1973 Elizabeth Jane Young resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto. This information was derived by an examination of the records of the United States Postal Service and by an independent investigation of the Federal Bureau of Investigation.

2. [material deleted] Joanne Miyamoto and Mary Kochiyama have been attempting to gain access to functions that would be attended by Emperor Hirohito.

3. Investigation by Special Agent George Hofmann of the United States Secret Service on the morning of October 3, 1975 conducted at Apartment 3B, 545 West 126 Street, Manhattan, which revealed that the above-named Mary Kochiyama currently resides at that address. This investigation included an interview by Special Agent Hofmann of the occupants of Apartment 3B, 545 West 126 Street, Manhattan, who confirmed the fact that Mary Kochiyama resided at the apartment, but who advised Special Agent Hofmann that they were unable to provide the Secret Service with any information concerning her present whereabouts.

4. Information supplied to the United States Secret Service by the Federal Bureau of Investigation to the effect that an in-

vestigation has disclosed that Joanne Miyamoto and Mary Kochiyama are currently members of the Asian Americans for Action, a Japanese led organization, which organization has in the past demonstrated against the United States-Japan Security Treaty.

5. Federal Bureau of Investigation Intelligence information provided to your deponent and the United States Secret Service describes Mary Kochiyama as a contact for various extremist groups in New York City, including the Black Panther Party and the Black Liberation Army.

It is the opinion of the undersigned and of the United States Secret Service that the existence of the firearm described in your deponent's affidavit in support of this search warrant and the involvement of the above-mentioned individuals poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States. Accordingly, pursuant to Title 18 of the United States Code, Section 2056 and the authorization to protect the person of a visiting head of a foreign government as embodied therein, the foregoing information is provided in support of the application of the United States for a search warrant for the above-described premises.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent or any Special Agents of the United States Secret Service to search the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK,

SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING and to seize the above-described firearm and any other evidence relevant thereto.

/s/ Neal Findley
S/A Neal Findley, U.S.S.S.

Sworn to before me this
3rd day of October 1975

VINCENT A. CAPOGGIO
United States Magistrate
Eastern District of New York

U.S.M. E.D.N.Y.

REPLY AFFIDAVIT OF NEAL FINDLEY,
SWORN TO JANUARY 28, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against- AFFIDAVIT

KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, 75 CR 851

Defendants.
----------x

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

NEAL FINDLEY, being duly sworn, deposes and says:

1. The affidavit submitted by William Liebovitz, the attorney for the defendant Kenneth Raymond Chin, alleges that I had "ample opportunity", prior to the issuance of a warrant to search the defendant's premises, "to learn and know in the ordinary and prudent exercise of [any] duty" that the defendant Elizabeth Jane Young did not pose any threat to the safety of the Emperor of Japan during his visit to New York City which commenced on October 4, 1975 (Aff. p. 2).

2. Specifically, Mr. Liebovitz alleges that we failed improperly to conduct "any surveillance of the defendants personally

to determine the truth or falsity of the claim made in [my] affidavit that the defendants were connected with a threat to the Emperor's or others' personal safety." What he claims should have been undertaken was a twenty four hour surveillance, and that "the slightest effort by the defendants to go anywhere or do anything that appeared, however remotely, to be preparatory to making any physical contact with or otherwise causing any threat to the Japanese Emperor would instantaneously have been followed inch by inch through "appropriate surveillance" (Aff. pp. 2-3).

3. Mr. Leibovitz concludes this aspect of his attack on my credibility by alleging that (Aff. p. 4):

> "what would have been revealed to Agent Findley by any good faith, direct surveillance of the defendants is exemplified by the provable events of October 4, 1975, on the morning of their arrest. While their residence was being searched Ms. Young was attending a weekly four-hour class in plumbing at Local No. 1 of the Plumber's Union in Brooklyn, New York where she has been an indentured trainee of the Union. Such facts were and are readily verifiable by the government. At the same time defendant Chin was doing the weekly household shopping and was arrested upon returning to the residence carrying large bundles of groceries. Such were the defendants' activities on the first day of the Japanese

> Emperor's arrival in New York City. Obviously, they were not engaged in threatening the safety of His Excellency, as Agent Findley had alleged without benefit of any previous direct surveillance of these defendants. His failure to conduct any such surveillance before swearing to an "opinion" of the serious threat allegedly posed by them was a reckless disregard of the truth."

4. The allegations are based upon an obvious lack of knowledge of the time pressure under which we were operating and the practical problems posed by direct surveillance. The information which formed the basis of my supplemental affidavit was relayed by the Federal Bureau of Investigation to the Secret Service sometime on October 1, 1975, and was received by teletype by the Secret Service in New York at 11:15 A.M. on October 2, 1975. The Emperor of Japan was scheduled to arrive in New York City on October 4, 1975 and to attend a football game at Shea Stadium on October 5, 1975. Accordingly, if the warrant was to be executed during daylight hours, prior to the arrival of the Emperor, it had to be obtained sometime on October 3, 1975.

5. We therefore had no more than twenty four hours to act. This provided us with little enough time to check out certain basic facts, much less conduct an extensive surveillance. And, more significantly, it has been our experience that physical surveillance is notoriously unreliable, par-

in a large metropolitan area, where the risk of losing the suspect on a crowded street, highway, or subway is not insignificant. Of course, needless to say, these defendants were not the only persons who the Secret Service was concerned about with regard to the safety of the Emperor. At least two dozen other persons were potential threats who had to be investigated.

6. Moreover, the fact that "the provable events" on October 4, 1975, the morning of their arrest would have demonstrated that the defendants were not "engaged in threatening the safety of His Excellency" hardly proves anything. On November 21, 1963, for example, "the provable events", which would have been disclosed by a physical surveillance of Lee Harvey Oswald, were that he spent the day at the home of his wife and children, that he played on the lawn with his daughter Junie, that he ate dinner with his family at 6:30 P.M., and went to bed at 11:30 P.M. (Manchester, The Death of a President, 102-105 [1967]). Very little would have been disclosed to indicate that he would attempt to assassinate the President of the United States the next day. On the other hand, a search of those premises would have likely resulted in the seizure of the murder weapon.

7. Several other claims made by Mr. Leibovitz relating to the good faith of the Secret Service merit a response:

a. First, at no time to my knowledge did any member of the Secret Service alert the news media to the fact that a search

would take place. Such action would have been contrary to our policy. And, indeed, such prior disclosure could have been embarrassing had the search proved fruitless. We did, however, alert the New York City Police Department to the fact that the search would be made. This is done so that they can properly respond to calls from neighbors regarding what may be a forcible entry into an apartment. It is conceivable that the leak emanated from that source.

b. Second, this case was transferred to the Alcohol, Tobacco & Firearms Bureau of the Treasury Department because the evidence disclosed by the search established a clear violation of the laws regulating firearms (a matter within its jurisdiction). Although a veritable arsenal of weapons was uncovered, including the weapon which was the subject of the search warrant,* there was no direct evidence to charge the defendants with a conspiracy to assassinate the Emperor of Japan. While it is true that the defendants were released from custody before the Emperor's departure from the United States, they were not released until after his departure from New York and, of course, after the seizure of weapons. By this time there was reason to believe that whatever threat they may have posed was significantly diminished.

c. Third, the defendants attack the truthfulness of Paragraph "1" of my supple-

* Annexed hereto as Exhibit A are photographs of the weapons and related items seized.

mental affidavit which alleges: "Investigation by Special Agents of the United States Secret Service which revealed that during the year 1973 Elizabeth Jane Young resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto.

The defendants claim that Joanne Miyamoto did not reside at 4303 Arlington Avenue, Los Angeles, California, but at "a separate residence bearing no resemblance to the address of Ms. Young." This allegation is only partially accurate. First, let me say, we have been advised by the Federal Bureau of Investigation that the correct address on Arlington Avenue in which the defendant Young resided was 4304 rather than 4303 Arlington Avenue and that the discrepancy was due to a typographical error in the transmission of the information. Second, it is true that Joanne Miyamoto did not reside at that address; however, she did reside in an adjoining two story house at 2208-43rd Street immediately around the corner from the one-story residence of Ms. Young at 4304 Arlington Avenue. This discrepancy in the affidavit is, I believe, attributable to the haste with which the information was gathered and the supplemental affidavit was prepared.

/s/ Neal Findley

Sworn to before me
this 28th day of January, 1976.

/s/ Olga S. Morgan
OLGA S. MORGAN
Notary Public of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 1977

MOTION FILED
OCT 31 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASIAN LAW CAUCUS, INC.; THE SANTA CLARA COUNTY ASIAN LAW ALLIANCE, INC.; PACIFIC/ASIAN COALITION; JAPANESE AMERICAN CITIZENS LEAGUE (EASTERN DISTRICT); ORGANIZATION OF CHINESE AMERICANS (NEW YORK CHAPTER); ASIAN AMERICAN WOMEN'S CAUCUS; ASIAN AMERICANS FOR COMMUNITY INVOLVEMENT, INC.; VISUAL COMMUNICATIONS/ASIAN AMERICAN STUDIES CENTRAL, INC.; ASIAN AMERICAN RESOURCE CENTER; COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, INC.; CLARK, PHIPPS, CLARK & HARRIS, INC.; NINGAS-COGON; CHINESE-AMERICAN CULTURE AND WELFARE FOUNDATION; ASIAN-AMERICAN STUDENT ASSOCIATION OF THE UNIVERSITY OF MASSACHUSETTS; ASIAN-AMERICAN ASSOCIATION OF THE HUNTER COLLEGE SCHOOL OF SOCIAL WORK; TRI-BASE COLLECTIVE; AND SALSA SOUL SISTERS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

JONATHAN A. WEISS
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New York, New York 10002
Attorney for Amici Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION OF THE ASIAN LAW CAUCUS, INC.; THE SANTA CLARA COUNTY ASIAN LAW ALLIANCE, INC.; PACIFIC/ASIAN COALITION; JAPANESE AMERICAN CITIZENS LEAGUE (EASTERN DISTRICT); ORGANIZATION OF CHINESE AMERICANS (NEW YORK CHAPTER); ASIAN AMERICAN WOMEN'S CAUCUS; ASIAN AMERICANS FOR COMMUNITY INVOLVEMENT, INC.; VISUAL COMMUNICATIONS/ASIAN AMERICAN STUDIES CENTRAL, INC.; ASIAN AMERICAN RESOURCE CENTER; COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, INC.; CLARK, PHIPPS, CLARK & HARRIS, INC.; NINGAS-COGON; CHINESE-AMERICAN CULTURE AND WELFARE FOUNDATION; ASIAN-AMERICAN STUDENT ASSOCIATION OF THE UNIVERSITY OF MASSACHUSETTS; ASIAN AMERICAN ASSOCIATION OF THE HUNTER COLLEGE SCHOOL OF SOCIAL WORK; TRI-BASE COLLECTIVE; AND SALSA SOUL SISTERS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Asian Law Caucus, Inc., the Santa Clara County Asian Law Alliance, Inc., the Pacific/Asian Coalition, the Japanese American Citizens League (Eastern District), the Organization of Chinese Americans (New York Chapter), the Asian American Women's Caucus, the Asian Americans for Community Involvement, Inc., the Visual Communications/Asian American Studies Central, Inc., the Asian American Resource Center, the Council on Interracial Books for Children, Inc., Clark, Phipps, Clark & Harris, Inc., Ningas-Cogon, the Chinese-American Culture and Welfare Foundation, the Asian-American Student Association of the University of Massachusetts, the Asian-American Associa-

tion of the Hunter College School of Social Work, the Tri-Base Collective, and the Salsa Soul Sisters respectfully move, pursuant to Rule 42 of this Court's rules, to file the within brief amici curiae. Counsel for the petitioners have consented to the filing of this brief; the Solicitor General has not responded to our request for consent.*

The aforementioned organizations are deeply concerned about the protection of civil rights of all Asian Americans. The issues in this case have broad significance for the Asian American community. Our major concern centers on the racially prejudicial inferences contained in the affidavit of the United States Secret Service to support their search warrant application. Furthermore, this case raises important questions concerning the legal standard to be applied in determining the sufficiency of search warrant affidavits containing false statements. Since these issues have ramifications that extend beyond the particular case before the Court, we seek the opportunity to present our views on this matter and respectfully move for leave to file this brief.

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*Copies of the letters from petitioners and the requests for consent from the Solicitor General are being lodged with the Clerk.

Respectfully submitted,

JONATHAN A. WEISS
43 Canal Street
New York, N.Y. 10002

Attorney for Amici Curiae

October 24, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE ASIAN LAW CAUCUS, INC.; THE SANTA CLARA COUNTY ASIAN LAW ALLIANCE, INC.; PACIFIC/ASIAN COALITION; JAPANESE AMERICAN CITIZENS LEAGUE (EASTERN DISTRICT); ORGANIZATION OF CHINESE AMERICANS (NEW YORK CHAPTER); ASIAN AMERICAN WOMEN'S CAUCUS; ASIAN AMERICANS FOR COMMUNITY INVOLVEMENT, INC.; VISUAL COMMUNICATIONS/ASIAN AMERICAN STUDIES CENTRAL, INC.; ASIAN AMERICAN RESOURCE CENTER; COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, INC.; CLARK, PHIPPS, CLARK & HARRIS, INC.; NINGAS-COGON; CHINESE-AMERICAN CULTURE AND WELFARE FOUNDATION; ASIAN-AMERICAN STUDENT ASSOCIATION OF THE UNIVERSITY OF MASSACHUSETTS; ASIAN-AMERICAN ASSOCIATION OF THE HUNTER COLLEGE SCHOOL OF SOCIAL WORK; TRI-BASE COLLECTIVE; AND SALSA SOUL SISTERS AS AMICI CURIAE

Interest of Amici Curiae

The Asian Law Caucus, Inc., is a non-profit community law office dedicated to providing legal and educational services to Asian American communities in the San Francisco Bay Area. The Asian Law Caucus attempts to overcome discrimination against Asian Americans by providing bilingual legal counselling and representation for people who could not otherwise obtain adequate legal help, and by lecturing and educating Asian Americans about their legal rights and alternatives. Since its incorporation in 1972, the Asian Law Caucus,

Inc. has represented Asian Americans in the areas of employment, problems of the elderly and housing.

The Santa Clara County Asian Law Alliance, Inc., is a non-profit community organization that provides legal services to low-income people. It was created to inform Asian and Pacific peoples about their legal rights and available social services, and to educate community agencies about the particular problems of Asian Americans.

The Pacific/Asian Coalition is a national organization of peoples of Asian and Pacific Islander ancestry living in the United States. The aims of the Coalition are to advocate and facilitate human services for Asian and Pacific Island Americans; to provide technical assistance to Asian and Pacific Island Americans in developing locally-determined human service programs; and to educate people about issues affecting the lives of Asian and Pacific Island Americans. The Mid-Atlantic Region consists of the local affiliates of New York, New Jersey, Pennsylvania, Delaware and the District of Columbia.

The Japanese American Citizens League is a civil and human rights organization whose primary purpose is to protect the civil rights of persons of Japanese and other Asian ancestries in the United States. The Eastern District consists of the New York, Philadelphia, Seabrook and Washington, D.C. chapters.

The Organization of Chinese Americans (New York Chapter) is a non-profit, non-partisan civic and civil rights advocacy organization of concerned Chinese Americans whose aims are to secure the inherent rights as Americans and to generate action programs of interest to Chinese and other Asian Americans.

The Asian American Women's Caucus seeks to influence the legislative process in order to assure political, social and economic equality for Asian American women.

Asian Americans for Community Involvement, Inc., provides advocates for Asian Americans threatened with the loss of basic services.

Visual Communications/Asian American Studies Central, Inc., is a non-profit educational media organization composed of educators, parents, students, and media specialists. Since 1971, the organization has developed educational materials that depict Asian Americans in non-stereotypic, multi-dimensional roles.

The Asian American Resource Center is composed of individuals of diverse racial and national backgrounds who have come together to create a multi-media resource center. The photographs, periodicals, books and films which they collect depict the everyday lives of Asian people in the United States from the mid-1800's to the present. Their interest in this case stems from the legacy of discrimination against Asian Americans in the courts and in Congress which their research has uncovered.

The Council on Interracial Books for Children, Inc., is a non-profit organization founded in 1966 by a group of librarians, teachers and writers concerned with racism and sexism in children's books. The Council critiques school materials and has produced a special bulletin on Asian American images in children's literature.

Clark, Phipps, Clark & Harris, Inc., founded by Dr. Kenneth B. Clark, is a management consultant firm experienced in dealing with race relations and equal employment practices.

Ningas-Cogon is the only monthly periodical for Filipino and Filipino-Americans in the United States. The magazine reports on legal developments affecting Asian Americans.

The Chinese-American Culture and Welfare Foundation is a membership organization dedicated to the well-being of Chinese-Americans.

The Asian-American Student Association of the University of Massachusetts is an organization of undergraduate and graduate Asian American students of the University of Massachusetts at Amherst.

The Asian-American Association of the Hunter College School of Social Work is comprised of graduate students concerned with educational activity and social action affecting Asian Americans.

The Tri-Base Collective, an organization of Asian, Hispanic, Native American and black men, deals with problems of Third World men in the areas of education and employment through legal referrals and counselling.

The Salsa Soul Sisters is a group of black, Asian and Hispanic women who study the problems which confront women and Third World people. Through education and counselling, the organization seeks to rectify the wrongs that affect these groups.

REASONS FOR GRANTING THE WRIT

We hereby concur with and adopt the arguments set forth in the brief amicus curiae submitted by the Asian-American Legal Defense and Education Fund to this Court on September 23, 1977. We therefore urge that the Court issue a writ of certiorari to review the judgment below.

Respectfully submitted,

JONATHAN A. WEISS
43 Canal Street
New York, New York 10002

Attorney for Amici Curiae

October 24, 1977

see

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